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The “Political Marketplace” Metaphor from a Labor Perspective

Thomas Tso*

ABSTRACT

The use of the political marketplace analogy is common in the academic literature on the law of democracy. The analogy between a consumer and voter lies at the heart of this analogy. This Article presents an alternative vision of the marketplace analogy. Instead of a consumer-voter, this article presents a marketplace framework that relies on an analogy between laborer and voter. Through the use of judicial opinions and discussions of labor law, labor economics, and political science, this Article presents an alternative political marketplace framework with implications for how we use the marketplace analogy in policy and legal contexts.

I. INTRODUCTION: THE “POLITICAL MARKETPLACE” ANALOGY

The term “political marketplace” is increasingly used in academic literature and judicial opinions.¹ The most famous and prevalent use of the “marketplace” analogy is in First Amendment jurisprudence.² The First Amendment is often described as protecting a marketplace of ideas.³ Beyond the First Amendment protection of speech context, the “political marketplace” provides a framework for describing the interaction among democratic institutions more generally. For example, Richard Pildes and Samuel Issacharoff analogize economic markets and democratic institutions for the purpose of examining democratic competition between political parties.⁴ In essence, these scholars view political markets as

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1. For example, out of a total of sixty-seven federal cases using the exact term “political marketplace,” two were from the late 1970s, nine from the 1980s, and fifty-six from 1990 onward. The dominance of the “marketplace” vision in First Amendment law is described by Phina Lahav in *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 480-81 (1987).

2. For an extensive examination of this metaphor, see David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL’Y REV. 236, 239-45 (1991).

3. See generally *id.*

4. See generally Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political*

similar to economic consumer markets. In this "political marketplace" metaphor, parties produce candidates and voters choose these candidates based on the attractiveness of the candidates and their ideas.⁵ Candidates, along with their packaged ideas, platforms, speeches, advertising, and images, are the "product." Political parties compete with each other by changing their "products" in an attempt to attract a larger number of voters willing to choose their products under heavy judicial and legislative scrutiny. Parties are thus like a heavily "regulated industry,"⁶ with voters as their consumers. The relationship between voters and parties is one of marketing and consumption.⁷ The party is a private institution, and voters cast their ballots in a private transaction, just as corporations are private entities and consumption decisions are private decisions.

The metaphor is straightforward, persuasive, and has strong rhetorical value and important implications for framing constitutional issues.⁸ While Pildes and

Parties: A Reassessment of Competing Paradigms, 100 COLUM. L. REV. 775 (2000).

5. This analogy is explored fully in Issacharoff & Pildes, *supra* note 4, at 674-75, where they compare the two political parties to two merchants selling to customers. For a straightforward explanation of the consumer-centric marketplace metaphor, see Gerald M. Pomper, *The Fate of Political Parties*, 2 ELECTION L.J. 69, 69-71 (2003).

6. Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 52 (2004) ("Democracy is a 'heavily regulated industry,' and just as individual Contracts Clause rights are specially conditioned in such industries, so too are the rights of democracy inevitably conditioned by the entire institutional structure within which these rights exist."). This view has origins in the theories of Anthony Downs and Joseph Schumpeter. See David Schleicher, *Irrational Voters, Rational Voting*, 7 ELECTION L.J. 149, 155-57 (2008).

7. Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753, 774 (2000). According to Ortiz:

Like any producer in a controlled market, [the two political parties] will serve their own interests first and as much as possible. They will exploit us as much as they can.

... Given our rational political indifference, we truly need these institutions to do much of the work of politics. *Democracy-as-consumption* will not work well without independent producers. But in a two-party system, we dare not give political parties the autonomy they need to make our politics work best. To give them independence without free competition would turn these institutions against us. Right now we have a strong two-party system without strong parties. Let us hope that someday we will have the courage to have the opposite.

Id. (emphasis added). For an overview of the historical literature describing the intentional merging of consumption and voting, see Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526, 632-35 (2004) (describing the evidence for the trope, "the heroic consumer").

8. See generally Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986). Justice Souter noted recently in a dissenting opinion:

Amici ... suggest that a political party strong enough to redistrict without the other's approval is analogous to a firm that exercises monopolistic control over a market, and that the ability to exercise such unilateral control should therefore trigger "heightened constitutional scrutiny." The analogy to antitrust is an intriguing one that may prove fruitful, though I do not embrace it at this point out of caution about a wholesale conceptual transfer from economics to politics.

Vieth v. Jubelirer, 541 U.S. 267, 350-51 n.5 (2004) (Souter, J., dissenting) (citations omitted) (citing Issacharoff, *supra* note 4, and Issacharoff & Pildes, *supra* note 4). For an example of this use of the "voting-as-consumption" metaphor in court, see *Suster v. Marshall*, 121 F. Supp. 2d 1141, 1144 (N.D. Ohio 2000) ("Plaintiffs claimed that as voters, they are entitled to consume as much political campaign speech as judicial candidates might wish to express."), and *Suster v. Marshall*, 951 F. Supp. 693, 696 (N.D. Ohio 1996).

Issacharoff offer a complete consumer marketplace vision of democracy, other scholars have emphasized different strands of this vision by focusing on the voter-consumer,⁹ the party-corporation,¹⁰ or the candidate-product.¹¹ The “voter as a consumer” trope is more than mere description; it is a framework for understanding democratic institutions with significant normative and legal implications, i.e., treating voters in the political marketplace *like* consumers in the economic marketplace.¹²

In this Article, I present an alternative political marketplace framework that leads to different normative conclusions for election law and policy. I distinguish the “voter-consumer” framework and this Article’s alternative framework respectively as a “consumer-centric” versus a “labor-centric” perspective. This “labor-centric” view of the political marketplace suggests that the voter is a worker, parties are corporate employers, and candidates are political managers. Political parties enter into long-term relationships with the voting electorate akin to employer-employee relationships; they allocate voter-workers to maximize return on political power to the party, its managers, and its financier-shareholders.¹³ This is not to say that political markets are stagnant; rather, they are more akin to a labor market where voters can change political parties. Unlike a consumption decision, a decision to switch parties is more deliberate and is influenced by endowment factors (geography, education, etc.).

In short, this Article suggests the party-voter relationship is more akin to an employer-employee relationship than a producer-consumer relationship. Accordingly, because the party-voter relationship is analogous to an employment relationship, labor scholarship, including labor law, can be a useful tool to understand political governance and voting. Moreover, by viewing the party-voter relationship from a labor-centric, rather than consumer-centric, perspective, the economic-political marketplace analogy leads to different normative conclusions for law and policy. This alternative perspective can also highlight the deficiencies in examining the political marketplace solely from a consumer-centric perspective.

(“Plaintiffs avow that, as voters, they would like to consume as much political campaign speech as judicial candidates might wish to express.”).

9. See, e.g., Brest, *supra* note 8, at 188-89; Sheryl Kroen, *A Political History of the Consumer*, 47 HISTORICAL J. 709 (2004).

10. See, e.g., Randall S. Kroszner & Thomas Stratmann, *Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation*, 48 J.L. & ECON. 41 (2005) (extending analysis of firm strategy in the economic marketplace to Political Action Committee contributions in the political marketplace).

11. See, e.g., Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 283 (1984) (calling voters “hirers” of their representatives).

12. See, e.g., Brest, *supra* note 8, at 188-89.

13. See Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7 (2002) (describing the calculations to manufacture and maximize wins); JOHN H. ALDRICH, *WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 19-20 (1995) (viewing political parties as an instrument for political candidates).

II. MAPPING THE ELEMENTS OF LABOR-CENTRICISM

In describing political parties, academic literature often uses V.O. Key's tripartite conception of the party: "(1) the party-in-the-electorate, made up of ordinary party members, (2) the party-in-the-government, which includes all elected and appointed officials sharing a given party affiliation, and (3) the party organization (or 'professional political workers')." ¹⁴ In contrast, this Article posits an alternative mapping of the political party as a way to introduce each component of the labor-centric framework: (A) the party employees (i.e., ordinary party voters and low-level political workers in the party organization); (B) the party managers (i.e., party members in government office and high-level professional political workers); (C) the corporate entity (i.e., the party as an individual legal person); ¹⁵ and (D) the party shareholders (i.e., the campaign financiers and donors). Each grouping is discussed below.

A. *The Voter as Party Employee*

The legal conception of the voter as a "worker" or "employee" of a political party is reflected in Justice Powell's defense of patronage practices in several dissenting opinions, most notably his opinion in *Elrod v. Burns* (joined by then-Chief Justice Burger and then-Justice Rehnquist). ¹⁶ Throughout these dissents, Justice Powell outlines a vision of the party and its role in democratic practice. According to Justice Powell:

Patronage practices broadened the base of political participation by providing incentives to take part in the process, thereby increasing the volume of political discourse in society. Patronage also strengthened parties, and hence encouraged the development of institutional responsibility to the electorate on a permanent basis. ¹⁷

14. See, e.g., Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 88 GEO. L.J. 2181, 2185 (2001) (citing V.O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* 163-65 (1964)).

15. Corporations are considered separate "legal persons." See, e.g., R.N.S., Note, *Corporate Standing to Allege Race Discrimination in Civil Rights Actions*, 69 VA. L. REV. 1153, 1169-71 (1983) (describing the "reification" of corporate entities as individual legal persons).

16. 427 U.S. 347 (1976) (Powell, J., dissenting). Justice Stewart later endorsed this view by joining Justice Powell's dissent in *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Powell, J., dissenting). Justices Scalia and Thomas have also endorsed this view. See, e.g., *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 688 (1996) (Scalia, J., dissenting) ("There can be no dispute that, like rewarding one's allies, the correlative act of refusing to reward one's opponents—and at bottom *both* of today's cases involve exactly that—is an American political tradition as old as the Republic. This is true not only with regard to employment matters, as Justice Powell discussed in his dissenting opinions in *Elrod* . . . and *Branti* . . . but also in the area of government contracts . . .").

17. *Elrod*, 427 U.S. at 379 (Powell, J., dissenting).

Under his view, patronage is ultimately concerned with the relationship between political parties and their volunteer campaign workers; patronage practices treat this relationship as akin to an employment relationship. The political party offers government jobs as incentives for campaign workers to do its bidding on a permanent basis. Through the prism of patronage, a relationship between campaign volunteers and political parties is not purely platonic; the motivation for the volunteers' political labor relies on much more than just ideological conviction. Parties cannot and do not depend solely on ideological persuasion to motivate political workers.¹⁸ Instead, they pay workers with more tangible rewards. In his *Elrod* dissent, Justice Powell considers patronage as a fundamental part of the life of political parties. Justice Powell writes:

History and long-prevailing practice across the country support the view that patronage hiring practices make a sufficiently substantial contribution to the practical functioning of our democratic system to support their relatively modest intrusion on First Amendment interests. The judgment today unnecessarily constitutionalizes another element of American life—an element certainly not without its faults but one which generations have accepted on balance as having merit.¹⁹

This practice of “patronage,” intrinsic to “American (democratic) life,” is perhaps only the most overt practice of rewarding work in political practice. Apart from government jobs, campaign workers can also gain influence in local political organizations, employment in partisan non-profits, and general networking opportunities. Patronage reflects only a small slice of the relationship between political parties and their affiliates: rewarding its more prominent campaign workers with political appointments.

Taking Justice Powell's observations one step further, *all* party affiliates, including voters, who participate in the political process, may have similar relationships with the political party. Voting and participation *are also* work; the difference between volunteering for a campaign and casting a ballot in multiple elections for a political party is not a categorical difference—it can be considered a difference in degree.²⁰ Parties need campaign volunteers to work the campaigns; they also need to control their affiliated voters so that they consistently work, i.e., cast ballots in their favor. Justice Scalia, endorsing Justice Powell's views in a

18. As Justice Powell notes, “[i]t is naive to think that these types of political activities are motivated at these levels by some academic interest in ‘democracy’ or other public service impulse.” *Id.* at 385.

19. *Id.* at 388-89; see also *Branti v. Finkel*, 445 U.S. 507, 522 & n.1 (1980) (Powell, J., dissenting).

20. The difficulties in trying to draw the line between what is a “political” activity is described by Justice Douglas' dissent in *U.S. Civil Service Commission v. National Ass'n of Letter Carriers*, 413 U.S. 548, 595-600 (1973) (Douglas, J., dissenting). See also *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 196 (1971) (Marshall, J., dissenting) (“The question is not aimed at concerted activity of whatever sort oriented to the doing of illegal acts, but at affiliations with political associations that ‘advocate’ or ‘teach’ certain political ideas. All kinds and degrees of affiliation are covered: indifferent and energetic members alike, in well-disciplined organizations or in any transitory ‘group of persons.’”).

dissenting opinion, stated that "[t]he Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success."²¹ As ideological persuasion is often insufficient to motivate campaign volunteers, it can be equally insufficient to motivate voting-work for party success. Therefore, we can extrapolate Justice Powell's view on patronage—that an active party needs campaign volunteers who are incentivized by tangible rewards—to a broader view that *all* forms of participation for a political party can be considered "work" and, therefore, requires some link to a tangible "reward" and "party discipline."²² In important ways, both campaign volunteers and voters can be considered akin to "employees" of the political parties.

The Supreme Court has offered this definition of "employment": "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."²³ This definition of "employment" has two major prongs: a control relationship between an employer and an employee resulting primarily in some benefit to the employer. Usually the employee also receives some reward or compensation for the work performed.²⁴ In other words, "employment" is: (1) a fixed, usually hierarchical, relationship between an employer and employee, and (2) a benefit to the employer from the employee in exchange for compensation. As I shall argue in the remainder of this section, both volunteer campaign workers and voters have characteristics of party "employees" by satisfying these definitional prongs: (1) they both have stable, but not necessarily permanent, subsidiary relationships with the party; and (2) they both do "work" primarily benefiting a party, which then rewards them (e.g., patronage) for effective work.

1. A Stable Subsidiary Relationship

Judges have described the relationship between a voter and a party as "political affiliation."²⁵ Judges have also described "political affiliations" or party "loyalty" as similar, in some respects, to religious belief, race, and nativity.²⁶ In

21. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 105 (1990). Post-*Rutan* social science research has not refuted the validity of Justice Powell's observations. See *Carver v. Foerster*, 102 F.3d 96, 109 n.9 (3d Cir. 1996) (Becker, J., concurring).

22. Cf. Pomper, *supra* note 5, at 75-76.

23. *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

24. *United States v. Somsamouth*, 352 F.3d 1271, 1275 (9th Cir. 2003).

25. See, e.g., *United States v. Brown*, 381 U.S. 437, 465 (1965) (White, J., dissenting) ("Similarly invalidated are statutes denying positions of public importance to groups of persons identified by their business affiliations, commonly known as conflict-of-interest statutes. In the *Douds* case the Court found in such statutes support for its conclusion that Congress could rationally draw inferences about probable conduct on the basis of political affiliations and beliefs, which it considered comparable to business affiliations.").

26. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 650 (1982) (Stevens, J., dissenting) ("Thus, the Court has considered challenges to discrimination based on 'differences of color, race, nativity, religious opinions [or] political affiliations,' to redistricting plans that serve 'to further racial or economic discrimination,' to biases

other words, the voter is loyal (implying subservience) to the party in a stable "affiliate" relationship. "Political affiliation" is similar to other forms of subservient membership within a "corporate" entity, such as employment in an economic corporation.²⁷ For example, Jonathan Macey observed that both political parties and economic corporations act as "mediating institutions" that manage their members, i.e., voters and employees, in a very similar fashion.²⁸ According to Macey, both political parties and corporate organizations encourage "loyalty," i.e., acceptance of the mediating institutions' role in shaping members' (e.g., employees, voters) interests and actions.²⁹ For example, political parties provide voters heuristics for choosing candidates by identifying candidates as representatives of the party, thereby guiding voter behavior.³⁰ Thus, strong affiliation with a party often overpowers transitory and independent influences on a voter's choice.³¹

In his dissents in the patronage cases, Justice Powell equally viewed political parties as a "mediating" institution; moreover, to him, for voters, like workers, corporate (party) affiliation is an act of self-definition. In *Elrod*, Powell observed

'tending to favor particular political interests or geographic areas.'" (internal citations omitted)); *Elrod v. Burns*, 427 U.S. 347, 380 (1976) (Powell, J., dissenting) ("They are employees seeking to avoid discharge—not citizens desiring an opportunity to be hired by the county without regard to their political affiliation or loyalty.").

27. Affiliations have been considered, in some circumstances, as a type of "employment," in the broad sense, under the law. See *Bama Tomato Co. v. U.S. Dep't of Agric.*, 112 F.3d 1542, 1546-47 (11th Cir. 1997); see also *Brown*, 381 U.S. at 465; *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 390-92 (1950) (analagizing political affiliations with business affiliations in the employment conflict-of-interest context).

28. Jonathan R. Macey, *Packaged Preference and the Institutional Transformation of Interests*, 61 U. CHI. L. REV. 1443, 1444 (1994) ("Mediating institutions actually define the preferences of their constituents, both by making decisions for them and by changing their priorities over time. Studies of this transformative role are best developed in the case of the modern corporation, but the transformation of preferences occurs in other social institutions as well."). One example he gives is the transformation of attitudes towards tobacco by Philip Morris employees. See *id.* at 1444 n.2. Another is the transformation of attitudes in the voting context. See *id.* at 1476.

29. There are many real life examples of such effects resulting from corporate membership. For company loyalty, see, for example, *HarperCollins San Francisco v. Naional Labor Relations Board*, 79 F.3d 1324, 1330 (2d Cir. 1996) (describing how a corporation enlisted its employees in a "war" against labor unions). For a dramatic example of tests of political party loyalty, see *Canton v. Todman*, 259 F. Supp. 22, 24 (D.V.I. 1966), which describes a statutory requirement of an "oath of allegiance to the political party" before any member of the party can submit his or her name as a candidate in the primary elections.

30. See Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1162 ("A normative endorsement of heuristic reasoning thus flows from a realistic acknowledgment of the central role that political elites play in American politics. It is a wishful endeavor to pray that citizens can become better individual democrats, without also considering the powerful function of politicians, activists, interest groups, and other elites. Political scientist John Zaller has demonstrated persuasively that an overwhelming amount of public opinion is shaped by heuristic cuetaking from political elites, on issues ranging from racial toleration to military spending. In short, citizens depend on political elites to gather political information and synthesize deliberative judgments for them.").

31. See *id.* at 1149-51 ("Instead of carefully considering all relevant information about the candidates, citizens leverage their knowledge about the major political parties as an organizing heuristic for understanding who the candidates are, whether the candidates are credible, and which candidate best represents them.").

that voters stick with their self-identified party loyalties despite misgivings over the slate of candidates.³² In other words, their selection of candidates is mediated through their corporate loyalty. As one commentator notes:

[Justice Powell] contended that the act of choosing to participate in one party's primary is tantamount to affiliating with the party. Powell viewed party membership as an act of individual self-definition, not as alignment with a particular party ideology. If an individual believes himself to be a Democrat and registers with the party, he joins the party regardless of whether his beliefs run counter to the party platform.³³

In addition to the party's mediating role, political affiliation is fundamentally stable, i.e., an act of "self-definition."³⁴ Employees in corporations also self-identify with their employer-corporations; employees continue to remain loyal to their corporation despite misgivings about current management.³⁵ The party, like the corporation, has a significant role to play in fostering corporate loyalty through the voter's stable and long-term commitment to partisan party politics and the political process. As a recent political science study of electoral turnout in numerous democracies concluded, "[t]he decision to vote . . . is like the

32. Justice Powell writes in *Elrod*:

It is naive to think that [local] political activities are motivated at these levels by some academic interest in "democracy" or other public service impulse. For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties. . . . Parties generally are stable, high-profile, and permanent institutions. When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices. Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.

Elrod v. Burns, 427 U.S. 347, 385 (1976) (Powell, J., dissenting) (citations omitted).

33. Charles E. Borden, *Primary Elections*, 38 HARV. J. ON LEGIS. 263, 275 (2001).

34. However, Powell does not see political parties as representative of a clear ideological persuasion. See *Democratic Party of the U.S. v. LaFollette*, 450 U.S. 107, 132-33 (1981) (Powell, J., dissenting). Nevertheless, this does not run counter to the observation that voters are employed and influenced by the current dominant ideological persuasion as enforced by the current presiding political managers. Corporations often change hiring patterns, strategic visions, etc.; however, these changes, like in the political context, are not sudden or common.

35. Even with high mobility across corporate jobs, organizational behavior scholars have argued that "commitment" to the corporate organization (i.e., corporate loyalty) can still be strong among mobile workers. See Todd L. Pittinsky & Margaret J. Shih, *Knowledge Nomads: Organizational Commitment and Worker Mobility in Positive Perspective*, 47 AM. BEHAV. SCIENTIST 791, 802-04 (2004). The purpose of "change management" in business school is the challenge of winning over the employees from a previous management; there is an assumption that the employees will not exit after the entrance of new management. See generally JANICE A. KLEIN, *TRUE CHANGE: HOW OUTSIDERS ON THE INSIDE GET THINGS DONE IN ORGANIZATIONS* (2004). Economist Amartya Sen has also described voters as "committed" to political parties. See Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 333-34 (1977).

decision to support a particular party. Just as support for political parties is established for most people early in adult life, so with [voter] turnout.”³⁶

Implicitly, the plurality in *Elrod* also acknowledged the power of party affiliations to command individual behavior for long periods of time. One of the plurality’s rationales for criticizing the patronage system relied on the idea that as employees of the administrative state, party volunteers would have a conflict of interest.³⁷ They feared government would become “partisan” government.³⁸ Federal employees were thus prohibited from working on campaigns because they would be serving two masters.³⁹ In other words, the plurality believed the major problem with patronage was that political campaigners would be “employed” by two different “employers”—the informal employer (the party) and the formal employer (the government).⁴⁰ Thus, even after the campaign, a campaign worker employed by the government would be affected by his previous (and possibly continuing) employment as a party affiliate.⁴¹ The plurality considered these dual affiliations as creating, on balance, negative effects on the political marketplace by creating partisan governments.⁴² In his dissent, Justice Powell agreed with the plurality that workers may serve two masters, but disagreed that this situation would have, on balance, deleterious effects. Instead, Powell argued that patronage formalizes the informal necessary relationship among parties, party workers, voters, and government.⁴³ For Powell, parties need government positions to reward the labor required for party operations; this incentive strengthens political participation and partisanship, thereby developing stronger relations between government and the voting electorate. In short, party “employment” is rewarded with government employment, and the carrot of government employment encourages more party “employment” and activity. They are somewhat translatable and mutually reinforcing.

This description of the voter-party relationship as stable and subservient accords with a school of thought in political science called the “Michigan Model.” The main tenet of the Michigan Model is the centrality of commitment

36. MARK N. FRANKLIN ET AL., *VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945*, at 12 (2004).

37. *Elrod*, 427 U.S. at 355-57.

38. *Id.* at 362.

39. This rationale has been extended by Circuit Courts. For example, the Third Circuit writes:

The constitutional prohibition against patronage derives from the coercive aspects of the spoils system which inhibit the rich political discourse protected by the First Amendment. Without the protection afforded by the Constitution, employees might forgo the expression of their political beliefs or artificially change their political association to avoid displeasing their supervisors. Such coercion, whether direct or indirect, is incongruent with a free political marketplace.

Robertson v. Fiore, 62 F.3d 596, 600 (3d Cir. 1995) (internal citations omitted).

40. See *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 564-65 (1973).

41. See *Am. Commc’ns Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 390-92 (1950).

42. *Elrod*, 427 U.S. at 373 (“More fundamentally, however, any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms.”).

43. *Id.* at 384 (Powell, J., dissenting).

to partisanship in the determination of electoral outcomes and in predicting voter attitudes and behaviors. As one political scientist describes this model:

Few factors are of greater importance for our national elections than the lasting attachment of tens of millions of Americans to one of the parties. These loyalties establish a basic division of electoral strength within which the competition of particular campaigns takes place. . . . Most Americans have this sense of attachment with one party or the other. And for the individual who does, the strength and direction of party identification are facts of central importance in accounting for attitude and behavior.⁴⁴

Since the 1970s, political scientists have attacked the Michigan Model, arguing that trends projected the demise of partisanship and a rise in the new "independent voter."⁴⁵ The classical independent voter paradigm considers voters as free and relatively open to distinguish between competing parties; partisan labels do not determine the voters' eventual private voting decisions.⁴⁶ The independent voter paradigm accords with the "voter-as-consumer" trope: voters, like consumers, make private decisions with limited constraints; they rationally and independently assess the attractiveness and benefits of each product-candidate.⁴⁷ However, Larry Bartels and many other contemporary political scientists have suggested that the perception that the Michigan Model has failed is inaccurate. Partisan affiliations are fairly important and powerful in predicting voter behavior.⁴⁸ Political affiliation may appear weaker because there is an appearance of diminished political partisanship as people invest less social

44. ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* 121 (1960).

45. See Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AM. J. POL. SCI. 35, 36 (2000).

46. See, e.g., *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 228 n.18 (1989) ("In States where parties are permitted to issue primary endorsements, voters may consider the parties' views on the candidates but still exercise independent judgment when casting their vote.").

47. For the classic and influential take on these analogies, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418-20 (1956).

48. Bartels, *supra* note 45, at 44 ("In the meantime, a significant revision of the conventional wisdom of political scientists, journalists, and other observers regarding 'partisan decline' in the American electorate seems to be long overdue. References to 'the weak hold of the two major political parties' and the 'massive decay of partisan electoral linkages' would have been mere exaggerations in the 1970s; in the 1990s they are outright anachronisms. In the current political environment, as much or more than at any other time in the past half-century, 'the strength and direction of party identification are facts of central importance' in accounting for the voting behavior of the American electorate." (internal citations omitted)). Citing these "references" that Bartels now criticizes, Justices Souter and Thomas have concluded that party loyalty has declined. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (Souter, J., dissenting); see also *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 472 n.4 (2001) (Thomas, J., dissenting). For further evidence supporting Bartels' position, and an interesting discussion of the definition of "partisanship" in voting, see, for example, Warren E. Miller, *Party Identification, Realignment, and Party Voting: Back to Basics*, 85 AM. POL. SCI. REV. 557, 557-59, 565-66 (1991).

capital into political affiliations.⁴⁹ Regardless, under the Michigan Model, political affiliation constitutes a long-term ideological “self-definition” that influences and prods political activity, such as voting.⁵⁰ For example, Amartya Sen has similarly described economic workers and voters as behaving out of “commitment.”⁵¹ In essence, voting, like working, is an activity that grows out of a subservient and stable relationship with a corporate body.⁵²

Voting for a political party has much in common with working for a corporate body. Like employment, voting signals a loyalty, though not immutable loyalty, to a political body.⁵³ Likewise, voting does not involve detached independence exemplified by typical consumer-corporate relationships. Instead, voting, like employment, encourages a self-definitional relationship that is not easily severed. The Court has recently observed that:

Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold.⁵⁴

Neither labor-centric nor consumer-centric models argue for the two poles identified by the Court: either voters as independent actors without significant partisan constraints *or* voters as actors with immutable political affiliations. However, shading towards one pole or the other affects one’s perception of the *fluidity* of voter movement from one political party to an opposing political party. Viewing voters as consumers implies that voters can change with limited constraints from election to election depending on the attractiveness of the products provided (i.e., when a party provides an “utterly incompetent

49. There are reasons other than “voter independence” that may explain why partisan affiliations *appear* to be weaker. Perhaps the perceived decline in the power of partisan commitment has more to do with the decline in the intensity of the commitment to parties rather than the increasing “independence” of voters; voters are still affiliated, but they are generally less motivated (or have less opportunity) to participate/labor, and thereby identify with party politics. In the language of Robert Putnam’s work, while political parties are influential in voting decisions, its members may invest less social capital into these organizations (in line with the global decline in social capital investments). See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 37-38 & n.19 (2000) (noting the decline in commitment and noting the correlation between “independence” with less political participation); see also James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413, 1456 n.169 (2007).

50. See Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2091-94 (1996).

51. Sen, *supra* note 35, at 333-34.

52. See Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 843 (“[P]olitical officials typically cultivate their own constituencies and personal loyalty, not party activism.”).

53. *Id.*

54. *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004); see also *Davis v. Bandemer*, 478 U.S. 109, 156 (1986) (O’Connor, J., concurring).

candidate"); viewing voters as employees implies that changing party affiliation is a fairly uncommon phenomenon, and any change to this stable and self-definitional preference can only occur after some deliberative process.⁵⁵ In this sense, viewing voters as laborers is consistent with views that geographic boundaries and other endowment factors correlate with voting behavior; implicitly, voting behavior, like employment, is relatively stable, changes only in the long-term, and such changes are controlled by other stable and open endowment factors like geography and mobility, rather than being purely controlled by transient features such as the "competence" of a candidate or preference for a particular candidate.⁵⁶ Similar factors are not as obvious or transparent in relatively fluid consumer markets.⁵⁷ Thus, political markets, like labor markets, are less fluid than what is presumed in an analogy of political markets to consumer markets. The foregoing discussion sketches a preliminary basis for arguing that voters engage in a stable and subsidiary working relationship with a political party; the party prods the voter to work for certain positions or to support candidates despite misgivings.

2. Rewarding Work

The first half of this section dealt with the fairly similar member-institution relationships found in both employee-employer and voter-political party relationships. The essential element that moves these relationships beyond merely "membership" within a corporate entity is the member's "work" and its corresponding reward. Courts define "work" in fairly broad terms.⁵⁸ A recent study suggests that voting is a "habit"—once one starts voting, one continues to vote.⁵⁹ Courts also acknowledge the important direct trade-off between working

55. ALAN WERTHEIMER, COERCION 294-306 (1987).

56. *Davis v. Bandemer* is but one instance of how one's perception about the fluidity in voting patterns is actively debated with legal ramifications. 478 U.S. 109 (1986). In a concurring opinion, Justice O'Connor observes that:

[W]hile membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party. It is difficult enough to measure "a voter's or a group of voters' influence on the political process as a whole" . . . when the group is a racial minority in a particular district or community. When the group is a major political party the difficulty is greater, and the constitutional basis for intervening far more tenuous.

Id. at 156 (O'Connor, J., concurring) (emphasis added). Justice Powell writes in dissent that "[f]or example, the mapmakers split Fort Wayne, a city with a demonstrated tendency to vote for Democratic candidates, and associated each of the halves with areas from outlying counties whose residents had a pattern of voting for Republican candidates." *Id.* at 180 (Powell, J., dissenting) (emphasis added).

57. See, e.g., Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1722-23 (1999).

58. E.g., *United States v. Somsamouth*, 352 F.3d 1271, 1275-76 (9th Cir. 2003).

59. Alan S. Gerber, Donald P. Green & Ron Shachar, *Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment*, 47 AM. J. POL. SCI. 540, 549 (2003); FRANKLIN ET AL., *supra* note 36, at 12; DANIEL I. KERTZER, RITUAL, POLITICS, AND POWER 49 (1988) (describing voting as a ritual).

at a corporate job and political activity, including voting.⁶⁰ Some have linked the qualification and ability to work with the qualification and ability to vote.⁶¹ Commentators also describe voting as “work.” For example, Donald Keim and Benjamin Barber base their visions of a “strong democracy” on citizen action “in the form of common work.”⁶² There is also empirical evidence that voters themselves generally see voting and politics as “work.” For example, labor-related issues are important barriers to voting.⁶³ In other words, while people may want to vote, situational obstacles prevent them from carrying out their voting work.⁶⁴ One study found that the location of the polling place can cause significant differences in voter turnout.⁶⁵ Out of the reasons offered for not voting, 58.5% are labor-centric.⁶⁶ In 2002, according to a U.S. Census survey, two of several “labor-centric” reasons for not voting were: no time to vote due to

60. See, e.g., *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 424-25 (1952) (“[Missouri’s law] is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. . . . The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.”).

61. For early views on how wage earners argued for their right to vote based on their ability to work, see Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 367 (1989). For similar arguments used today for including immigrants as voters, see Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1092 (1977) (noting the suspect classification offered to alien employment but not voting); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1460-61 (1993) (noting the extent of alien participation in the workforce). For arguments against allowing felons to vote because of their inability to work, see Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1638-39 (2004).

62. BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 151 (1984); see also Donald W. Keim, *Participation in Contemporary Democratic Theories*, NOMOS XVI 20-21 (1975) (“Action is the mode of activity characteristic of the political realm.”); Melvin I. Urofsky, *Introduction: The Root Principles of Democracy*, Democracy Papers (Nov. 2001), available at <http://usinfo.org/zhtw/DOCS/Demopaper/dmpaper1.html> (on file with the *McGeorge Law Review*) (“Democracy is hard, perhaps the most complex and difficult of all forms of government. It is filled with tensions and contradictions, and requires that its members labor diligently to make it work.”). This view is also consistent with Justice Brandeis’ view. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 675 (1988) (“To Brandeis, public discussion is a ‘duty.’ It is a duty because political liberty is a fragile condition, easily lost when its institutions and traditions fall into the hands of inert people.”).

63. See, e.g., Moshe Haspel & H. Gibbs Knotts, *Location, Location, Location: Precinct Placement and the Costs of Voting*, 67 J. POL. 560, 570 (2005) (describing the “costs” associated with voting).

64. There is evidence that reducing these situational obstacles to make it easier to cast a vote increases voter turnout. *Id.* Although, there is some debate over the magnitude of these increases. See generally Jan E. Neighley & Jonathan Nagler, *Unions, Voter Turnout, and Class Bias in the U.S. Electorate, 1964-2002*, 69 J. POL. 430 (2007).

65. Haspel & Knotts, *supra* note 63, at 570.

66. The other “labor-centric” reasons offered were: “illness or disability” (13.1%); “out of town” (10.4%), “registration problems” (4.1%), “transportation problems” (1.7%), “inconvenient” (1.4%), and “bad weather” (0.4%). U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2002, at 14 (2004), <http://www.census.gov/prod/2004pubs/p20-552.pdf> (on file with the *McGeorge Law Review*).

being "too busy" or "conflicting schedule." Taken together, these two excuses account for the top reason (27%) why people did not vote.⁶⁷ Consumer-centric reasons, such as personal preferences against voting or against the candidates, were less frequent. These reasons accounted for only 19.3% of the total reasons (12.0% because they were "not interested" in the election and 7.3% because they "did not like the candidates").⁶⁸ Furthermore, 22.2% of non-voters offered no reason or unrelated reasons ("Don't know or didn't answer" (7.5%), "Other Reason" (9.0%), and "Forgot" (5.7%)).⁶⁹ Why do voters sacrifice the time and energy to vote? In other words, what motivates voters to overcome these labor-related barriers? An analogy to judicial theories concerning democracy through the lens of patronage practices may again be useful to answer this question. Underlying the debate in the patronage cases is: what is the real motivation for helping out on political campaigns?

The history of patronage practices, as Justice Powell suggests, indicates that the lure of some tangible reward may be the real motivation for party workers to overcome the labor costs associated with voting. Powell suggests that the "work" of local political parties can only be sustained through patronage practices. Powell writes:

Patronage hiring practices . . . enable party organizations to persist and function at the local level. Such organizations become visible to the electorate at large only at election time, but the dull periods between elections require ongoing activities: precinct organizations must be maintained; new voters registered; and minor political "chores" performed for citizens who otherwise may have no practical means of access to officeholders.⁷⁰

Justice Scalia, after citing this quote approvingly, adds in a subsequent dissenting opinion that: "[e]ven the most enthusiastic supporter of a party's program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going

67. *Id.* For older results, see also CENSUS BRIEF, "TOO BUSY" TO VOTE (1998), available at <http://www.census.gov/prod/3/98pubs/cenbr984.pdf> (on file with the *McGeorge Law Review*).

68. The lack of interest in the elections could be also be re-framed, as I will discuss later, under the labor-centric paradigm, as the failure of the corporation/parties to motivate their employees/voters, causing a lack of general interest in the election; *or*, the lack of voter interest could be framed under the labor-centric paradigm as a failure of particular managers/political candidates to motivate their employees, thus causing a dislike for the candidates. *Cf.* *Elrod v. Burns*, 427 U.S. 347, 384-85 (1976) (Powell, J., dissenting) ("The candidates for these offices derive their support at the precinct level, and their modest funding for publicity, from cadres of friends and political associates who hope to benefit if their 'man' is elected. The activities of the latter are often the principal source of political information for the voting public. The 'robust' political discourse that the plurality opinion properly emphasizes is furthered—not restricted—by the time-honored system."). In other words, the voter does not necessarily dislike the candidates or their platforms, but rather the party did not sufficiently mobilize them to vote.

69. U.S. CENSUS BUREAU, *supra* note 66, at 14.

70. *Elrod*, 427 U.S. at 385 (Powell, J., dissenting).

through the off years.”⁷¹ Equally, the “chore” and “drudgery” of actually voting for political parties cannot be sustained without some tangible reward. As Pamela Karlan notes:

I make this suggestion tentatively. A serious objection to paying voters to cast their ballots, parallel to a convincing argument against paying for blood donations, is that current voters will feel deprived of their civic virtue if voting becomes an activity done for money. But it is hard to imagine many voters, in contrast to many blood donors, for whom the hardship or expense of voting actually increases the utility they receive from going to the polls. In any case, I think it likely that the potential increase in the number of Americans participating in the electoral process would outweigh the risk of devaluing voting by paying for it.⁷²

Ideological conviction may be insufficient to sustain voting work done for parties, particularly for elections for less important posts and over the long run.⁷³ Powell suggests that local patronage practices are a permissible means to reward party work done for candidates running for unimportant posts. Powell notes, “[i]n short, the resource pools that fuel the intensity of political interest and debate in ‘important’ elections frequently ‘could care less’ about who fills the offices deemed to be relatively unimportant.”⁷⁴ In other words, political workers see patronage as the culmination and the reward for political work in the form of campaign-volunteering, monetary donations, or for publicly affiliating and endorsing a candidate. The work ultimately benefits the party. As Powell notes, “[p]atronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary to the continued functioning of political organizations.”⁷⁵

The reward for political labor could encompass less visible forms of “work” and “chores” that help perpetuate political institutions, such as affiliation, advocacy, participation, polling, and voting.⁷⁶ In *Tashjian v. Republican Party of Connecticut*, the Court acknowledged a “broad spectrum of roles in [a political] organization’s activities” and that, “[c]onsidered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in

71. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 104 (1990) (Scalia, J., dissenting).

72. Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1472-73 (1994).

73. See Gerber, Green & Shachar, *supra* note 59, at 548-49 (suggesting that continued voting and apprehensiveness about voting may result less from ideological preferences and more from cognitive attitudes towards the work itself—i.e., “the act of voting itself”).

74. *Elrod*, 427 U.S. at 384 (Powell, J., dissenting).

75. *Branti v. Finkel*, 445 U.S. 507, 527-28 (1980) (Powell, J., dissenting).

76. See *de Vera v. Blaz*, 851 F.2d 294, 295 (9th Cir. 1988) (referring to “federal and territorial election statutes prohibiting a candidate from promising public employment for an individual in consideration for the individual’s vote, support, or work in a candidates’s [sic] election campaign”).

any sense the most important."⁷⁷ Voting should be no different from other forms of political participation. Ultimately, voting, like campaign volunteering, is a task necessary to the continued functioning of political organizations; parties and candidates alike will seek to reward and motivate voters to work for them under a continued relationship.

There is some evidence of an incentive less tangible, but akin to patronage, connected with voting work. Paul S. Martin, a political scientist, has demonstrated that a higher participation rate measured solely by voter turnout triggers an increased reward of federal, state, and local financial support to that jurisdiction.⁷⁸ "Pork barreling" is an effective and highly used electoral strategy.⁷⁹ Patronage and "pork" both describe rewards in electoral strategy; the only difference is their relative magnitudes. The latter comes in the form of general budgetary allocations to a voting bloc within a jurisdiction, while the former is a specific job to a specific campaign volunteer. The per capita value of each reward is probably quite apt for the amount of labor (whether votes or campaign volunteering). Moreover, those most invested in the possibility of a penalty or reward from electoral outcomes also vote more often. Evidence shows that for at least the past decade, public employees as a bloc vote at significantly higher rates than private employees.⁸⁰ They may vote at higher rates because they are invested in possible rewards from a change or lack of change in the political administration.⁸¹

The fact that voting is more like "work" and less like a hobby is accentuated where the "benefit" of the voting labor or time "primarily and necessarily" itself really lies.⁸² The academic literature is skeptical that the voter receives any intrinsic value from voting.⁸³ Under a "labor-centric" perspective, the labor or use

77. 479 U.S. 208, 215 (1986). Scholars have agreed with this description of political participation. See, e.g., Elizabeth Garrett, *Thus Always Two Tyrants?*, 2 ELECTION L.J. 285, 290-91 (2003) (book review).

78. See Paul S. Martin, *Voting's Rewards: Voter Turnout, Attentive Publics, and Congressional Allocation of Money*, 47 AM. J. POL. SCI. 110, 111, 122-23 (2003).

79. See *id.* at 111.

80. In 1991, the Census noted that sixty-three percent of public employees versus forty-one percent of private employees voted. BUREAU OF THE CENSUS, STATISTICAL BRIEF, THE DECLINE IN AMERICAN VOTER TURNOUT (1991), available at <http://www.census.gov/population/socdemo/voting/SB91-23.pdf> (on file with the *McGeorge Law Review*). In 2004, similar and even more disproportionate numbers were found. U.S. Census Bureau, Voting and Registration in the Election of November 2004: Table 7 (follow link for "All Races"), <http://www.census.gov/population/www/socdemo/voting/cps2004.html> (last visited Apr. 1, 2009) (on file with the *McGeorge Law Review*) (showing that seventy-five percent of public employees voted as compared to fifty-seven percent of private employees).

81. See *Adkins v. Miller*, 421 S.E.2d 682, 689-93 (W. Va. 1992) (Neely, J., dissenting) (arguing that the opportunity for gaining or retaining government employment is rooted in elected officials, thus incentivizing the current civil service to vote to create or prevent change).

82. *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

83. See, e.g., Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 76-80 (1990) (summarizing views on voting); Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 PERSP. ON POL. 507, 512 (2004) ("There is now little room for enhancing turnout further by making registration easier. . . . [C]ontinued nonvoting by substantial numbers of citizens suggests that for many people, voting remains an activity from

of time for voting does not benefit voters directly. The anticipated rewards come only indirectly, if at all, when a voter's candidate wins and then decides to reward certain voters.

3. *Critiquing the Voter-Party Relationship as an Employment Relationship*

In the previous sections, I described how the voter has more of an "employment-like" relationship with political parties. An independent question is whether such a relationship is normatively "good." Justice Powell acknowledges that patronage practices can be a "corruptive" employment relationship, but also concludes that such practice is necessary to democratic processes.⁸⁴ This view has some similarity to the general perspectives regarding pork; pork is often considered a necessary, even if undesirable, part of political tradition.⁸⁵ According to Powell and those who agree with him, patronage practices, as well as pork, may galvanize lower level political work like grass-roots organizing and democratic action. For example, "historically excluded" groups can obtain political rewards by offering to do voting work. Judge Becker, former Chief Judge of the Third Circuit, citing Powell's dissent, writes:

[T]he patronage system historically has been critical to the survival and strength of political parties by allowing party leaders to reward their party faithful. Strong parties have, in turn, played a crucial democratizing role: they have stimulated political activity and encouraged meaningful political debate; they have enabled local candidates for office to attract attention to their candidacies and galvanize grass-roots organizing; and they have facilitated the political participation of historically excluded groups⁸⁶

While the First Amendment protects political parties' promises of rewards for voting, the courts and public opinion continue to have misgivings about such political behavior despite its alleged benefits;⁸⁷ there is a general sentiment that

which there is virtually no gratification—instrumental, expressive, or otherwise. Consequently, for those whose goal is a democracy where most people engage in the fundamental act of political participation, a pessimistic conclusion cannot be avoided."); Benny Geys, "Rational" Theories of Voter Turnout: A Review, 4 POL. STUD. REV. 16, 27 (2006).

84. *Elrod v. Burns*, 427 U.S. 347, 379 (1976) (Powell, J., dissenting). "Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process." *Id.* at 384.

85. See, e.g., Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1340 (2000) ("But no doubt part of the reason for the lack of reported prosecutions is that society (or at least prosecutors) may see legislative logrolling as beneficial, or at least as ubiquitous legislative behavior that is not worthy of punishment. Indeed, some states so tolerate legislative logrolling that they expressly exempt the practice from their anti-bribery laws.").

86. *Carver v. Foerster*, 102 F.3d 96, 106 (3rd Cir. 1996) (Becker, J., concurring).

87. See, e.g., *Brown v. Hartlage*, 456 U.S. 45, 58-59 (1982) ("A State may insist that candidates seeking the approval of the electorate work within the framework of our democratic institutions, and base their appeal on assertions of fitness for office and statements respecting the means by which they intend to further the public

this party "employment" of voters is too corruptive of democratic processes and good government.⁸⁸ The perception of corruption does not derive necessarily from the fact that voters are working to benefit political parties for a reward. The current system accepts the fact that some political work, like high-level political activity, can be rewarded by high-level political appointments.⁸⁹ Nor does the unease come purely from the possible corruptive influence of monetary exchange that clouds decision-making in democratic institutions. Political practice has always accepted some form of pork barreling as a necessary evil. While the public may be concerned with direct vote-buying in a pure sense, there is some acceptance of low-level influence-buying of powerful voters in different contexts (although it is not certain why), i.e., voters in administrative boards, Congress, and corporate control. Other examples, though in less crass manifestations, include: lobbying, campaign donations, pork-barreling, and the purchase of corporate shareholder proxy votes.⁹⁰

Setting the monetary question aside, the greater public and judicial concern is arguably with the establishment of a fixed and direct relationship between a select few—an "employment" of certain effective voters (i.e., political machines⁹¹)—to the exclusion of other voters: the creation of a "partisan"

welfare. But a candidate's promise to confer some ultimate benefit on the voter, *qua* taxpayer, citizen, or member of the general public, does not lie beyond the pale of First Amendment protection.").

88. See, e.g., *Elrod*, 427 U.S. at 379 (Powell, J., dissenting).

89. See, e.g., *Home Placement Serv. v. Providence Journal Co.*, 739 F.2d 671, 675 (1st Cir. 1984) ("It is common knowledge, or at least public knowledge, that the first step to the federal bench for most judges is either a history of active partisan politics or strong political connections or . . . both.").

90. Some argue for the acceptance of direct vote-buying if it allays the labor costs of voting. See, e.g., Karlan, *supra* note 72, at 1472-73. For a discussion of actual vote-buying in the market for corporate control, see Thomas J. André, Jr., *A Preliminary Inquiry into the Utility of Vote Buying in the Market for Corporate Control*, 63 S. CAL. L. REV. 533, 636 (1990):

Nevertheless, while it is evident that some caution should be exercised whenever corporate funds might be used to disenfranchise public stockholders, vote buying does not differ fundamentally from some other recent restructuring transactions. Thus, allowing firms to purchase the votes of their own public stockholders could provide those stockholders with a financial alternative that they cannot presently be offered.

Id. While vote-buying is illegal, see, e.g., CAL. ELEC. CODE § 18522(a) (West 1996) (prohibiting vote-buying) and *United States v. Garcia*, 719 F.2d 99, 102 (5th Cir. 1983) (banning incentives for voting for federal candidates), the Ninth Circuit has indicated that vote-swapping, which involves trading one's vote for another's vote, is constitutionally protected. See *Porter v. Bowen*, 496 F.3d 1009, 1020-21 (9th Cir. 2007). Vote-swapping may be viewed as a non-binding bartering of labor and an effort to create incentives to vote by making voting more worthwhile. Cf. Marc J. Randazza, *The Constitutionality of Online Vote Swapping*, 34 LOY. L.A. L. REV. 1297, 1314-15 (2001) (calling vote-swapping "exchanges of mere gratuitous consideration").

91. Even in modern democracies like Japan's, there are *explicit* political machines, which are described as such. One example is Japan's Liberal Democratic Party. See, e.g., ETHAN SCHEINER, *DEMOCRACY WITHOUT COMPETITION IN JAPAN: OPPOSITION FAILURE IN A ONE-PARTY DOMINANT STATE* 3-6 (2006) (describing the dominance of Japanese LDP party as based on a clientelist model, "where parties elected to office reward their supporters with private goods"); see also *Carver*, 102 F.3d at 109 n.9 (Becker, J., concurring) (noting that the critiques of patronage practices have come from "political machines"). For a description of political machines in American history wherein voters were paid, see, for example, RICHARD P. MCCORMICK, *THE HISTORY OF VOTING IN NEW JERSEY: A STUDY OF THE DEVELOPMENT OF ELECTION MACHINERY 1664-1911*, at 160-62 (1953).

government. This would contradict the idealistic view of voters and the government as politically autonomous and distant from political parties. This underlying concern is manifested in “conflict of interest” restrictions on the influence of political parties on other political realms where political autonomy in deliberation is valued. For example, the Hatch Act⁹² restricts bureaucrats’ political activities, and other statutory schemes also create transparency in decision-making so the people have confidence that votes in decision-making bodies are autonomous, i.e., voters in judiciaries, Congress, and other deliberative bodies have public disclosure obligations.⁹³ As the patronage cases bear out, these demands for political autonomy are normative decisions, seeking to determine the *normative role* of the government official when selecting his staff. In other words, *should* government officials use political affiliation in their deliberative decisions? For example, Powell would say yes, because it strengthens political participation. This normative question is distinct from whether there is evidence that government officials actually use political affiliation in their deliberative decision as a matter of political practice. In this sense, two separate issues are often intertwined but should remain distinct: (1) how voters make deliberative decisions and (2) what voters *should* do to further the ultimate goals of voting, i.e., to sustain democratic ideals.

Labor-centricism offers perspectives on both levels. For the first issue, the Michigan Model of voting, political science, and Census data offer evidence that voters may not be the ideal “independent voter” and decisions are mediated by patronage practices, pork-barreling, and party membership. For the second issue, Powell argues that patronage practices along with the formalization of rewards for political work can ultimately strengthen parties, democratic government, and the political process.⁹⁴ Labor-centricism merely extrapolates Powell’s observation as equally applicable to rewards for voting if voting is seen as a form of political work. However, the evidence about how voters actually behave is distinct from the normative gloss on this behavior. For example, one can agree with Justice Powell’s observations about the power of patronage in strengthening political parties in practice and reject his normative embrace of patronage as a pillar of a vibrant democracy.⁹⁵ Equally, one can agree that, in practice, parties employ

92. For a description of the Hatch Act, see U.S. Office of Special Counsel, Hatch Act for Federal Employees, http://www.osc.gov/ha_fed.htm (last visited Mar. 13, 2009) (on file with the *McGeorge Law Review*).

93. See, e.g., *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 470-71 (1995).

94. See *Elrod v. Burns*, 427 U.S. 347, 384 (1976) (Powell, J., dissenting). Powell, however, never explicitly considers the idea that rewards for voters may also strengthen democratic process.

95. See, e.g., *Horn v. Kean*, 796 F.2d 668, 684 (3d Cir. 1986) (Gibbons, J., dissenting), *abrogated by Bd. of County Comm’rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996) and *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996); *Jimenez-Fuentes v. Torres Gaztambide*, 807 F.2d 230, 232 (1st Cir. 1986). Both opinions accept Powell’s positive description of the effect of patronage on political parties, but dispute the normative value of Powell’s positive description in comparison to other First Amendment values in accord with the *Elrod*’s plurality (and controlling) opinion.

It is difficult not to share in the views expressed by Justice Powell, dissenting in *Elrod*, which we

voters, but normatively reject the view that such employment furthers democratic ideals.

In fact, throughout the rest of this Article, I posit that by accepting the view of the voter as having a stable and subservient relationship with the party, labor-centric perspectives may offer fresh perspectives on how to *normatively* improve democratic institutions. For example, labor-centric perspectives may highlight some of the problems political laborers face that are analogous to problems economic laborers face, such as unemployment (which I will address in a later section). Such a perspective may also highlight the positive contributions of political work, such as those highlighted by Justice Powell, including stable political parties and increased political participation. Moreover, this framework provides a positive account of the political marketplace to better understand voting problems; understanding these problems allows us to better fulfill the participatory and deliberative democrat’s *normative* ideals: voters *ought* to work and participate.⁹⁶

In sum, different views of the marketplace analogy can result in conflicting policy recommendations. For example, the voter-consumer vision sees patronage as a threat to the political marketplace, because it serves to “bribe” otherwise independent voters, thereby creating a motivation to vote unrelated to the candidate’s policy stances; patronage also obligates voters into a stable partisan relationship that threatens voter independence. In contrast, the labor-centric model posits that voters are in practice “employed” by large political parties.⁹⁷ Rather than avoid this reality, patronage and other rewards, if utilized in a proper fashion, can counteract voter alienation by compensating for labor costs of voting and incentivizing political activities.⁹⁸

B. The Party as Corporate Employer

In many respects, the party acts similar to a corporate employer. First, I will examine conceptualization of the party as an economic corporation from both a labor and consumer-centric perspective. Next, from the labor-centric perspective, I will examine how the political party utilizes, in practice, employer-like legal powers over voters. Finally, the labor-centric view of the party as corporate

have crudely reflected . . . in speaking of politics as the life-blood of the body politic. However, it is also impossible to dismiss the plurality opinion views, not only as to personal rights, but as to the “inefficiency” of “wholesale” turnovers.

Jimenez-Fuentes, 807 F.2d at 232.

96. *E.g.*, AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 146-47, 227-29 (1997).

97. *See Shakman v. Democratic Org. of Cook County*, 435 F.2d 267, 269-70 (7th Cir. 1970).

98. There are distributional issues when considering who can vote and work within political parties—those with more leisure time and/or money can afford these labor costs without compensation. By compensating for labor costs, perhaps more people, not just those who can afford it, can participate. *See Hasen, supra* note 85, at 1357-58.

employer also provides a legal space for voter unions within the political marketplace.

1. Employee Voice

Viewing the political party as a corporation is not ground-breaking. First of all, the political party is legally registered as a nonprofit corporate body; both academics and courts have treated the party as akin to an economic corporation.⁹⁹ Under a voter-as-consumer view, parties are viewed as private economic corporations; but this view focuses on how parties, as corporations, sell ideas and candidates in the political marketplace to voter-consumers.¹⁰⁰ As a result of this focus, the internal mechanisms that create these products are not relevant for voters.¹⁰¹ Conceptualizing the political party as analogous to a private economic corporation is an incomplete picture. Corporate entities, such as political parties, generally have characteristics of both public political associations and private corporations.¹⁰²

Under a voter-as-consumer model, voters are outsiders to the parties' major decision-making processes, since they are only consumers of what political parties package and present to them. Voters have no role within party mechanisms unless the party decides to allocate responsibility. For example, parties can make budgeting decisions private. The Supreme Court notes: "whether they like it or not, [political parties] act as agents for spending on behalf of those who seek to produce obligated officeholders" and political parties

99. See, e.g., *Republican Nat'l Comm. v. Fed. Election Comm'n*, 487 F. Supp. 280, 292 (S.D.N.Y. 1980) ("The plaintiffs in this action are the national committee of the Republican Party, a New York corporation . . ."). Parties have become more coherent ideologically as a single corporate body. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2378 (2006) ("In sum, the rise of a mature system of two-party competition nationwide, gerrymandered 'safe' election districts, and more powerful party organizations, among other factors, has led to the resurgence of more internally unified, ideologically coherent, and polarized parties than we have seen in many decades. And there is reason to expect that the parties will remain internally cohesive and ideologically distant for the foreseeable future.").

100. See generally Issacharoff & Pildes, *supra* note 4.

101. See Persily & Cain, *supra* note 4, at 790 (describing the "political markets paradigm" as overlooking the role of "voice").

102. Some scholars and courts treated *all* corporations as dual natured at one point in the legal history of the corporation. See, e.g., Kingman Brewster, Jr., *The Corporation and Economic Federalism*, in *THE CORPORATION IN MODERN SOCIETY* 72 (Edward S. Mason ed., 1959); Earl Latham, *The Body Politic of the Corporation*, in *THE CORPORATION IN MODERN SOCIETY* 218 (Edward S. Mason ed., 1959); see generally *THE CORPORATION IN MODERN SOCIETY* (Edward S. Mason ed., 1959). Roughly speaking, contemporary law (even though there are still exceptions) treat *public* corporations such as cities and churches more as voluntary associations of communities and *private* corporations more as self-regulating commercial enterprises. See, e.g., *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 92 (Tex. 1997) ("[F]ederal courts have held that some party activities, such as holding elections, are public state action, while other activities are private."). For a general critique and summary of the historical divergence between "public" and "private" corporations, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1065-67 (1980). However, nothing carries on the characteristics of both public and private entities today quite like the political party, particularly with its important role in public democracy and election law. See generally Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1747-54 (1993).

coordinate disbursement of financing from donors who may wish to support any candidate who will be obliged to the contributors.¹⁰³ Most importantly, the voter as consumer model presents no normative justifications for voter-consumer input. Likewise, in the private realm, consumers are not represented within corporations for business decisions, but remedied for harms after the fact under tort law.¹⁰⁴ Similarly, political party decision-making processes do not incorporate legally protected mechanisms for *ex ante* input, but rely on *ex post* judicial remedies if any.¹⁰⁵ The two remedies are to exit the market (i.e., choose not to purchase/vote) or to sue for damages after the fact. In the corporate realm, if consumers want input, they should convert to shareholders by purchasing stocks, even though they may have little concentrated power. This option is not plausible for private companies. Political parties are, in many respects, more akin to private companies, as they are without any transparent system of public shareholding. Thus, justifying *ex ante* input for the voter appears to run into a dead-end under mainstream corporate law theory if the voter is considered analogous to the consumer.¹⁰⁶

However, these conclusions may change if the voter is analogized instead to a laborer. Instead of exit or *post hoc* litigation, *ex ante* voice within the corporate entity is a justifiable option for voters (as laborers). The labor-centric model begins with the fact that "the voter is an employee of the corporation." Voters *are* part of the corporate entity and have stable relationships with the party for significant periods of time. Under a labor-centric view, voters become party/corporate "insiders" just like campaign workers. If campaign workers can have voice in party politics, the voter should equally have a claim to some voice.

103. Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 452 (2001).

104. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 442 (2001) (stating that "the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies . . . lie outside of corporate law" in, for example, labor and employment law, consumer protection law, environmental law, and tort law). *But see* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 630-43 (1992) (explaining how constituency statutes in corporate law can effectively protect constituencies outside of stockholders).

105. Even though consumer protection statutes exist, there are no *ex ante* mechanisms adaptable to changing consumer interests and harms similar to institutions such as the EEOC, OSHA, and labor unions that provide forums and have broader mandates for voicing and monitoring possible harms and concerns before they require litigation. In a sense, the Supreme Court's focus on *fraud* in political marketplace cases is akin to treating the voter as consumer who needs consumer protection statutes and only *ex post* remedies. The purpose of both consumer protection statutes and election law fraud statutes is to remedy acts that stain the (perception of) integrity of the process, not to monitor the status of one player vis-à-vis the other. *Compare, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 327 (1992) (White, J., concurring in part and dissenting in part) ("[The] creation and enforcement of consumer protection laws . . . protect buyers and sellers alike, the former by ensuring that they will have a ready means of protecting against fraud, and the latter by creating a climate of consumer confidence that inures to the benefit of reputable dealers in mail-order transactions."), *with* *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 231-32 (1989) (noting that regulations into internal party affairs are only necessary to "ensure that elections are fair and honest").

106. In fact, the political market analogies have been criticized particularly for overlooking any mechanism for voter voices. *See* Persily & Cain, *supra* note 4, at 790 (describing the "political markets paradigm" as overlooking the role of "voice").

Analogously, in the private realm, employers have fiduciary duties to prevent harm and protect active employee “voice” within their corporate institutions (these duties include those imposed under a variety of labor and employment statutes, such as the NLRA, FLSA, OSHA, ERISA, Title VII, etc.). At the very least, employer decisions must preserve and protect employee “dignity.”¹⁰⁷ Thus, under a labor-centric view, voters, as party employees, have greater claims to management voice when compared to voters framed as consumers. In similar respects, minority views in corporate law literature argue that consumers should have input in business decisions by relying on comparisons between the consumer and laborer.¹⁰⁸ By analyzing voters to laborers (as both are internal to their respective corporate bodies), the state has an interest in promoting voter welfare just as it has in promoting employee welfare. This interest can then justify regulatory entrance into the party’s “internal affairs,” an interest “in the democratic management of the political party’s internal affairs” that was dismissed by the Supreme Court in *Eu v. San Francisco County Democratic Central Committee*.¹⁰⁹ In *Eu*, the Supreme Court struck down a California statute barring the party’s endorsement of a candidate in the primaries and other attempts to regulate party structure as interfering with the party’s associational rights under the First Amendment.¹¹⁰ One of the justifications presented by the State was its interest in protecting the “primary voters from confusion and undue influence.”¹¹¹ Turning to the state’s efforts to “democratize” the party’s internal structure, the unanimous Court did not find a compelling interest, as the state could not show that its efforts were necessary to protect the integrity of elections.¹¹² The role of the state is therefore only to protect the political marketplace as viewed from a consumption model. The voter needs protection only against fraudulent and corrupt products or a party’s violation of the integrity of the “purchase” exchange itself. The corporate activity prior to that exchange is otherwise “private.” The Supreme Court in *Eu* dismissed the state’s argument for any enlarged role in regulating the party’s relationship with the voter. The Court reasoned that the “State has no interest in ‘protect[ing] the integrity of the Party

107. Compare *Bush v. Gore*, 531 U.S. 98, 104 (2000) (noting that the source of the fundamental nature of the right to vote lies in the “equal weight accorded to each vote and the equal dignity owed to each voter”), with *Fox v. Morton*, 505 F.2d 254, 256 (9th Cir. 1974) (arguing that voters and workers both similarly have a “dignity” interest not to be trammelled upon by larger institutions that are both public and private employers whether they be state legislatures combined with political parties or a government agency in its dual role as both provider of social services and a market employer).

108. See, e.g., Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1171-72 (1993). For example, consumer interest is protected on many administrative boards; consumer interest is represented by “public individuals” without any guidance except to serve a general “public interest.” See, e.g., *Finucane v. Pa. Milk Mktg. Bd.*, 581 A.2d 1023, 1026-27 (Pa. 1990) (noting the analogy between consumer members within industry boards and public at-large members in occupational boards).

109. 489 U.S. at 232.

110. *Id.* at 229, 233.

111. *Id.* at 215.

112. *Id.* at 232-33.

against the Party itself.”¹¹³ However, once viewed through a labor-centric perspective, voters appear more akin to lower-level party “employees.” Through this lens, the internal dynamics of a political party do not look like a simple “Party against the Party itself” dispute; instead, they resemble the power distribution between a “managerial” class within parties and “employees”—similar to the labor and employment law framework, which is a very “public” issue and problem.¹¹⁴ From a labor-centric perspective, a “democratic” management of voter-employees and employee “voice” may be a more easily justifiable compelling state interest.¹¹⁵

2. Parties’ Employer Powers

Political parties, as employers, have significant legal powers over voters’ employment environment. “[T]raditional party behavior” includes “ensuring orderly internal party governance.”¹¹⁶ The party’s first significant power is sourced in the party’s control over primaries, which is analogous to determining who can be employed. States delegate to political parties the power to define primaries according to their private decisions. These decisions are made internal to their “corporate bodies,” much akin to a corporation’s state-delegated power to determine who votes in shareholder meetings.¹¹⁷ Political parties also have

113. *Id.* at 232 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986)); *see also* *Ariz. Libertarian Party v. Schmerl*, 28 P.3d 948, 955 (Ariz. Ct. App. 2001) (approving state intervention that does not “implicate[] the internal workings of political parties”).

114. *Eu*, 489 U.S. at 232-33; *see also* *Cal. Democratic Party v. Jones*, 530 U.S. 567, 593 (2000) (Stevens, J., dissenting) (“As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations.”); Michael Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 181 (2005) (“Once we view political parties in terms of political conflict and cooperation among different factions of party actors, the Court’s doctrine of party autonomy in the party primary cases can be reframed as an implicit choice in favor of political resolution of disagreement.”).

115. *Am. Party of Tex. v. White*, 415 U.S. 767, 783 n.15 (1974).

116. *Jones*, 530 U.S. at 581.

117. *Pildes*, *supra* note 6, at 110-11.

States can mandate closed primary elections, in which only party members can participate. Closed primaries, like districts that concentrate voters with “common interests” and like the parties that PR elections produce, concentrate participation among voters who begin with more shared interests or preferences. States can instead require open primaries, in which independents, and sometimes voters registered with another party, can vote. The design of primary elections influences the types of candidates, and hence officeholders, likely to be elected. Primaries tend to be dominated by the most intensely engaged voters, who typically have more extreme views than median party members. Closed primaries accentuate these effects and are therefore likely to reward candidates more at the extremes of the distribution of office seekers. Open primaries produce candidates closer to the median voter’s views, or in more common language, more moderate candidates (and officeholders).

Id. For the possibility of allowing the voting of other constituencies, or allowing employees a stake in board decisions on management, *see* Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 403 (1983).

another power: the valuation and improvement of human capital and the voter-employees' working environment.

a. Control over Employment Primaries

If parties are permanent "corporations" with their own "employees," then they have the discretion to hire and keep new voter-employees in pursuit of their goals. For example, in a District of Connecticut case, *Nader v. Schaffer*, the plaintiffs filed a complaint challenging, in essence, the party's powers over hiring and retaining voter-employees.¹¹⁸ The plaintiff argued that:

[T]he alternative avenues of political activity open to them under Connecticut law [unless they participate in primaries] are ineffectual and unrealistic, since in most general elections, only the Democratic and Republican nominees have reasonable probabilities of success. . . . [A]ny dominant position enjoyed by the Democratic and Republican Parties is not the result of improper support, or discrimination in their favor, by the State. Rather, the two Parties enjoy this position because, over a period of time, they have been successful in attracting the bulk of the electorate, so that they now have substantial *followings*.¹¹⁹

Under a labor-centric model, Democratic and Republican parties' voter-workforce pool is essentially a restricted labor-force maintained and contained through primaries and party registration—i.e., a "following." The two dominant political parties also dominate the local legislatures that craft election policies, further restricting the labor-pool.¹²⁰ Some argue that voter registration policies, crafted by local and state political parties, have deliberately restricted the turnout and types of people who vote after considering strategies and policies that favor the party.¹²¹ Essentially, party leaders are deciding *who* to employ for a vote. The Court in *Burdick v. Takushi* acknowledged two state interests in restricting who can vote in primaries, both of which are related to the protection (or entrenchment) of the party structure.¹²² The two state interests are preventing "party raiding" and protecting against "unrestrained factionalism."¹²³

Increased competition from independent third parties, or parties splintered from the major parties, is framed as the threat of "unrestrained factionalism." The

118. 417 F. Supp. 837 (D. Conn. 1976).

119. *Id.* at 842-43 (emphasis added).

120. See Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 171 (1991).

121. See generally Francis Fox Piven & Richard Cloward, *Why Americans Don't Vote* (1988), reprinted in *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 108 (Samuel Issacharoff, Pamela S. Karlan & Richard S. Pildes eds., 1998).

122. 504 U.S. 428, 439 (1992).

123. *Id.* (quoting *Munro v. Socialist Workers Party*, 440 U.S. 173, 196 (1979)).

goal of political party primaries is therefore to “channel[] expressive activity at the polls.”¹²⁴ As the *Nader* plaintiffs noted, the activity is channeled, for all practicalities, to the two dominant parties. In labor-centric language, the parties, through captured state legislatures, protect their labor force by barring increased competition outside the major party system. Such protection against “unrestrained factionalism” effectively restricts new alternative parties from offering employment opportunities to voters.

“Party raiding” deals with the employment relationship between the party and the voter-employee: how the party can restrict employee liberties. The most recent case on “party-raiding” is Justice Thomas’ plurality opinion in *Clingman v. Beaver*.¹²⁵ In *Clingman*, the Court distinguished *Tashjian v. Republican Party of Connecticut* and upheld Oklahoma’s election laws regarding semiclosed primaries.¹²⁶ Semiclosed primaries did not allow voters to disaffiliate themselves and openly vote for another party in the primaries. The Court noted that while *Tashjian* had “struck down, as inconsistent with the First Amendment, a closed primary system that prevented a political party from inviting Independent voters to vote in the party’s primary,” this “case presents a question that *Tashjian* left open: whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary.”¹²⁷ Consistent with Justice Thomas’ adoption of Justice Powell’s dissenting views in the patronage cases,¹²⁸ the *Clingman* opinion views the political party not as a creation of individuals freely associating with one another, but instead considers the political party a corporation with its own employees. Thus, the Court preserved the party-corporation’s clear boundaries around its voter-workforce and protected the political party against another party raiding its workforce, such as a sore-loser in the primaries shifting their votes to new or alternative parties. The Court noted that “Oklahoma’s semiclosed primary advances a number of regulatory interests that this Court recognizes as important: it ‘preserv[es] [political] parties as viable and identifiable interest groups,’ enhances parties’ electioneering and party-building efforts, and guards against party raiding and ‘sore loser’ candidacies by spurned primary contenders.”¹²⁹ In a sense, the observation that parties have the power to protect “their” voters from shifting to splinter or third party groups indicates a corporate employment power over voter behavior: enforcing its voter-employment contract by preserving the integrity of political party against raiding by other parties and sore losers.¹³⁰ This type of contractual enforcement is in

124. 504 U.S. at 438 (emphasis added).

125. 544 U.S. 581 (2005).

126. *Id.* at 591-93.

127. *Id.* at 587 (internal citation omitted).

128. See *supra* note 16 and accompanying text.

129. *Clingman*, 544 U.S. at 593-94 (internal citations omitted) (emphasis added).

130. *Id.* at 596 (“Oklahoma has an interest in preventing party raiding, or ‘the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party’s primary election.’” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 n.9 (1983))).

tension with the idealism of consumption-based voting and with the view that parties act as a free association of independent-minded voters.

b. Human Capital and Workplace Control

The second employer power is the power to regulate the “workplace,” or the conditions that affect the way voters process and obtain political information in carrying out their political activity. There are two significant powers: a power to discipline members¹³¹ and a power to limit public scrutiny.¹³² First, parties can discipline members in the same way as supervisors discipline employees. Parties are “instrument[s] through which discipline and responsibility may be achieved within the Leviathan.”¹³³ It is true that parties no longer ascribe to a form of the “political machine” that strictly controls voters and candidates.¹³⁴ Nevertheless, parties are free to have an organizational structure with an internal dynamic including a level of party discipline, such as the expulsion of members. In *California Democratic Party v. Jones*, the Supreme Court struck down California’s blanket primary rule on First Amendment grounds.¹³⁵ In his dissent, Justice Stevens, joined by Justice Ginsburg, noted:

[T]he First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. It is not this Court’s constitutional function to choose between the competing visions of what makes democracy work—party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials—that are held by the litigants in this case. That choice belongs to the people.¹³⁶

According to the majority in *Jones*, the party and its officials, rather than the people through a blanket primary, create their own “vision.”¹³⁷

131. See, e.g., *Burdick v. Takushi*, 504 U.S. 428, 444 (1992) (Kennedy, J., dissenting) (criticizing a state ban against write-in votes); *Rivera v. Espada*, 777 N.E.2d 235, 237 n.1, 238-39 (N.Y. 2002) (noting that voters and politicians who do not conform to the party platform can be removed).

132. See, e.g., STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 97-100 (1990) (detailing the government’s restrictions on dissenting speech).

133. *Elrod v. Burns*, 427 U.S. 347, 379 (1976) (Powell, J., dissenting) (quoting Sorauf, *Patronage and Party*, 3 *MIDWEST J. POL. SCI.* 115 (1959)).

134. See *Geary v. Renne*, 880 F.2d 1062, 1073-75 (9th Cir. 1989) (describing the resilience of a California political machine).

135. 530 U.S. 567, 585-86 (2000).

136. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 598-99 (2000) (Stevens, J., dissenting) (citations omitted).

137. *Id.* at 581 (majority opinion) (“That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable. Respondents themselves suggest as much when they

In *Burdick*, the Supreme Court upheld Hawaii's prohibition against write-in voting, concluding that:

[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system. . . . We think that Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters.¹³⁸

Justice Kennedy's dissent in *Burdick*, joined by Justices Blackmun and Stevens, argued that the majority's opinion gave the party-employer the power to penalize voters with the backing of the legislature. Kennedy argued that parties can tighten their grip and penalize groups less likely to vote by restricting voting requirements and voting methods.¹³⁹

The second disciplinary power is the influence over gerrymandering decisions, which party leadership may use to completely control the placement of employees and their work-products (i.e., their value as a voter to the district, which is called "vote dilution").¹⁴⁰ Gerrymandering manipulates the working

assert that the blanket primary system will lead to the election of more representative 'problem solvers' who are less beholden to party officials." (internal citations and emphasis omitted)); *see also id.* at 587 (Kennedy, J., concurring) ("The true purpose of this law, however, is to force a political party to accept a candidate it may not want and, by so doing, to change the party's doctrinal position on major issues.").

138. *See Burdick v. Takushi*, 504 U.S. 428, 441-42 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

139. *See id.* 504 U.S. at 444 (Kennedy, J., dissenting) ("The majority's approval of Hawaii's ban is ironic at a time when the new democracies in foreign countries strive to emerge from an era of sham elections in which the name of the ruling party candidate was the only one on the ballot. Hawaii does not impose as severe a restriction on the right to vote, but it imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot."); *see also* Piven & Cloward, *supra* note 121, at 108-10.

140. Justice Kennedy notes:

[N]or should it be thought to serve [the Court's] interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: "'We are in the business of rigging elections.'"

Vieth v. Jubelirer, 541 U.S. 267, 316-17 (2004) (Kennedy, J., concurring in judgment) (quoting Hoeftel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1 (quoting a North Carolina Senator)); *see also Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

The quintessential act of political expression is the casting of a ballot. The quintessential act of political association occurs in the relationship between a voter and a favored candidate. The quintessential act of assembly is the rallying to the polls on Election Day. The election itself is the modern analogue of the petition for redress of grievances. When statewide political gerrymanders—either partisan or bipartisan—intentionally and systematically turn congressional elections into a mere formality, the acts of voting, assembling, associating, and petitioning are reduced to hollow rituals. Under such circumstances, voters ratify political choices made for them by someone else, but do not exercise the generative political power that is the essence of representative self-government.

Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 270-71 (2006).

environment of voters by channeling voter "work" to party-determined outlets (e.g., the district in which they vote and the candidates with whom they associate for campaign purposes); gerrymandering also permits parties to let go of less useful voters through vote dilution, thereby fomenting certain groups' disillusion and nonparticipation.¹⁴¹ Gerrymandering is like a "covenant not to compete" provision written into party employment: members of a jurisdiction with such a covenant *must* work for a particular party.¹⁴² "[T]he potential for voter disillusion and nonparticipation is great, as voters are forced to focus their political activities in artificial electoral units. Intelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose."¹⁴³

The labor-centric view of the political marketplace is also reflected in gerrymandering's focus: political parties use gerrymandering as a managerial device to allocate employees' responsibilities according to the value of their work and whether their work is needed. In other words, gerrymandering focuses on how party leadership can "dilute" a voter-employee's work responsibilities to accord with their work value. From this perspective, the employees are beholden to the managerial whims of the party architects for an allocation of work responsibility and reward, much akin to how corrupt boroughs are dependent on a patron's managerial whims. Justice Stevens made this comparison:

The rotten boroughs clearly would violate our familiar one-person, one-vote rule, but they were also troubling because the representative of such a borough owed his primary loyalty to his patron and the government rather than to his constituents (if he had any). Similarly, in gerrymandered districts, instead of local groups defined by neutral criteria selecting their representatives, it is the architects of the districts who select the constituencies and, in effect, the representatives.¹⁴⁴

141. See, e.g., *Bush v. Vera*, 517 U.S. 952, 1047-49 n.3 (1996) (Souter, J., dissenting) (stating that voting should be more than just a mere gesture).

142. Pildes, *supra* note 6, at 60-61. I agree with Pildes who considers gerrymandering as "agreements [that] reflect a covenant not to compete between the incumbents of the two parties." *Id.* at 60. However, the covenant is not imposed between incumbents, but rather on their steady pool of voter-laborers.

143. *Viet*, 541 U.S. at 322 n.6 (Stevens, J., dissenting) (internal quotations omitted). Gerrymandering can solidify partisan classifications.

If a State passed an enactment that declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles," we would surely conclude the Constitution had been violated. If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive. This possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is unrelated to the aims of apportionment and thus is used in an impermissible fashion).

Id. at 312 (Kennedy, J., concurring in judgment).

144. *Id.* at 331 n.25 (Stevens, J., dissenting).

Unlike the voter-as-consumer framework wherein political parties want to sell to as many voter-consumers as possible, a successful political party does not need to employ as many employees as possible. Instead, the political party wants to keep as many effective employees as needed because its reward resources are limited. Hence, there are campaign strategies that focus on particularly symbolic states (and voters), such as New Hampshire and Iowa.

Another form of employee control is information gate-keeping, i.e., the party's control over the release of information to its voters.¹⁴⁵ *Clingman* stated that political parties "remain[] free to govern themselves internally and to communicate with the public as they wish[]."146 Patronage practices and gerrymandering both have a "public" and "private" side. Patronage in its "public" face increases the premium on visible political work; in other words, visible political action can secure public rewards. Gerrymandering in its "public" face encourages overt essentialization by political architects and public debates as votes are allocated according to "public" characteristics, such as income, race, and geography (the "blue" vs. "red" state). Yet, for both gerrymandering and patronage practices, there are hidden "private" political compromises and party calculations that are products of closed internal party deliberations.¹⁴⁷ Parties retain power to control how these decisions that influence voting outcomes are released to the public (e.g., what types of jobs are subject to patronage rewards and what characteristics are important proxies for gerrymandering decisions). First Amendment scholars have noticed the extent of "corporate" censorship in the political marketplace or, as I call it, the voting workplace.¹⁴⁸ Political corporations can act as *quasi-governments*¹⁴⁹ that censor¹⁵⁰ information available to their employees. Major parties now have corporate control over both dissenting and mainstream political information.¹⁵¹ When candidates set the

145. Borden, *supra* note 33, at 275.

146. *Clingman v. Beaver*, 544 U.S. 581, 589 (2005).

147. See, e.g., *Plotkin v. Ryan*, No. 99 C 53, 1999 WL 965718, at *4 (N.D. Ill. Sept. 29, 1999) ("It is impossible to say whether and how the increased funds and campaign work that flowed to the . . . campaign as a result of the defendants' actions impacted the election, given the any number of ways the campaign might have spent (or not spent) that money and the myriad of external factors, many of which have nothing to do with the campaign itself, that influence independent voting decisions made by third-party voters."). Courts subscribe to the general proposition that "[t]he courts, generally and consistently, have been reluctant to interfere with the internal operations of a political party." *Irish v. Democratic-Farmer-Labor Party of Minn.*, 399 F.2d 119, 120 (8th Cir. 1968). For calculations behind gerrymandering, see Hirsch, *supra* note 13. Any attempt to litigate and thus "publicize" less overt patronage funding and relationships have been restricted by the standing doctrine. *Plotkin*, 1999 WL 965718, at *4 (citing *Allen v. Wright*, 468 U.S. 737 (1984)).

148. See, e.g., Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

149. Cf. Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1403-05 (2003) (explaining that the manner in which political corporations command allegiance and fidelity can be compared to the influence of religious associations).

150. BENJAMIN R. BARBER, *A PASSION FOR DEMOCRACY: AMERICAN ESSAYS* 142-58 (1998) (entitling the chapter as "The Market as Censor in a World of Consumer Totalism").

151. See SHIFFRIN, *supra* note 132, at 97-100 ("[T]he government appoints a corporation to manage a

campaign agenda with issues that are “traditionally associated with their party, they encourage voters to focus on those issues and to use them to cast their ballots.”¹⁵² The public acquiescence to this quasi-government control is analogous to the acceptance of employers’ quasi-governmental control of information in the workplace.¹⁵³

3. *Unions and the Corporate Employer*

As noted earlier, corporations have a public and private face. The tension between the dual historic public/private faces of the corporation as both a collective democratic association of voluntary individuals and a private hierarchical enterprise was somewhat alleviated by the growth of unionism in economic corporations;¹⁵⁴ unions strived to become voluntary, democratic, and public associations within corporations while corporations bolstered their hierarchical, commercial, and private characteristics.¹⁵⁵ A similar approach may apply to the political party, which is still an awkward hybrid of both voluntary association and corporate enterprise.¹⁵⁶ For example, one can compare Justice Scalia’s opinion in *Jones*, wherein he says “[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views,”¹⁵⁷ with his observation about political practice in *New York State Board of Elections v. Lopez Torres*: “[p]arty conventions, with their attendant

station reaching millions of people and grants the corporation virtually unfettered discretion to decide what issues will be discussed and who will discuss them.”); Herbert Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81, 95 (Robert Paul Wolff et al. eds., 1965) (“[W]ith the concentration of economic and political power and the integration of opposites in a society which uses technology as an instrument of domination, effective dissent is blocked where it could freely emerge.”).

152. Owen G. Abbe et al., *Agenda-Setting in Congressional Elections: The Impact of Issues and Campaigns on Voting Behavior*, 56 POL. RESEARCH Q. 419, 428 (2003).

153. Cf. *First Healthcare Corp. v. N.L.R.B.*, 344 F.3d 523, 529 (6th Cir. 2003) (“[I]t has been black-letter law for nearly fifty years that the Board cannot order employers to grant non-employee union organizers access to company property absent a showing that onsite employees are otherwise inaccessible through reasonable efforts.”).

154. See *supra* note 102; see also Lowenstein, *supra* note 102, at 1753.

155. Workplace democracy literature describes these efforts. See, e.g., *Burke v. Bevana*, 866 F.2d 532, 536-37 (2d Cir. 1989) (“A labor union is by law a democratic organization.”). See generally EDWARD S. GREENBERG, *WORKPLACE DEMOCRACY: THE POLITICAL EFFECTS OF PARTICIPATION* (1988) (describing the efforts of the Oregon lumber corporations along these lines); Clyde W. Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REFORM 689, 689-90 (1991) (noting that one of the purposes of traditional labor law was “to bring a measure of democracy to the workplace by giving workers an effective voice in decisions governing their working lives”).

156. See, e.g., *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 92 (Tex. 1997) (“We agree that a political party is a state actor in some instances, such as when it is conducting elections, but a private organization in other instances, such as when it is conducting certain of its internal affairs.”).

157. 530 U.S. 567, 574 (2000).

'smoke-filled rooms' and domination by party leaders, have long been an accepted manner of selecting party candidates."¹⁵⁸

Moreover, he notes in his *Rutan* dissent that:

As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political 'spoils.' What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless.¹⁵⁹

In essence, Scalia views the party *idealistically* as a voluntary band of members but *practically* as a hierarchical corporate enterprise.¹⁶⁰ As noted earlier, in light of these practices, unionization (and the normative goals of labor law) is an important tool for the implementation of democratic norms *in practice*.¹⁶¹

Accordingly, there may be a need for unions as institutions that democratically represent voters *within* political parties—institutions that are not motivated by the corporate goals (i.e., winning elections, campaign finance, and installing members in positions of power). The movement to unionism may be the *ex ante* institutionalized solution to prevent *ex post* litigation. Voters, as an independent coalition, may have standing to protect themselves against managerial party interests that may be adverse to their voting conditions. In *Federal Election Commission v. Akins*,¹⁶² the Supreme Court found standing for voters who sued the Federal Election Commission (FEC). Voters challenged the FEC's decision not to treat the American Israel Public Affairs Committee (AIPAC) as a "political committee," thereby allowing AIPAC to keep its public contributions to political candidates private.¹⁶³ The Court concluded that the group of voters had standing because they had a "concrete" albeit "generalized

158. 128 S. Ct. 791, 799 (2008).

159. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 109 (1990) (Scalia, J., dissenting).

160. Scalia argues, in *Rutan*, that not acknowledging different political practices in different contexts is "naïve." *Id.* at 103-04.

161. See *supra* note 155. For example, in *Duke v. Massey*, 87 F.3d 1226, 1235 (11th Cir. 1996), the Eleventh Circuit found no right for a potential candidate (who sued along with a group of voters) to challenge the Republican Party Committee's decision to exclude him from the presidential primary ballot even though the decision was not ratified by the entire membership. The court considered the Committee's decision as the will of the political party to define its own membership, because the Committee itself is allegedly democratically elected and is authorized to make decisions on behalf of the entire party. *Id.* Unionization seeks to ensure that these Committees *are* in fact democratically elected and serve the will of the people in these democratic elections. Summers, *supra* note 155, at 689-90 (noting that federal laws ensure that unions are democratically governed).

162. 524 U.S. 11, 26 (1998).

163. *Id.* at 21.

grievance" (i.e., an "informational injury" that was "directly related to voting").¹⁶⁴ In essence, voters *can* monitor the political process by mandating an administrative agency to force donors to disclose their relationships with candidates, so that the voters may "evaluate" the candidates.¹⁶⁵

A voter coalition instigating litigation on behalf of all voters to assert a concrete injury to voting is analogous to unions' institutional role: to seek remedies and protections on behalf of *all* employees for harms to their work and workplace whether or not the employee is a union member. There are several labor law cases that provide a good analog to the *Akins* case, including an Eastern District of Pennsylvania case, *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*,¹⁶⁶ and a Fourth Circuit case, *West Penn Power Co. v. NLRB*.¹⁶⁷ These two cases are representative of the numerous other examples of union challenges to OSHA and other administrative agency determinations that affect the workplace.¹⁶⁸ In *Delaware Valley*, the district court found standing for two trade unions suing on behalf of workers who lived, worked, and traveled near the defendant's manufacturing plant.¹⁶⁹ The defendant allegedly failed to provide accurate information to the EPA with regards to its toxic pollution harming the area where the workers lived, worked, or traveled near the defendant's plant.¹⁷⁰ In *West Penn*, the NLRB, with the unions as interveners, successfully sued a defendant corporation to release data on its contracting practices to determine whether the corporation shifted labor from union members to contracted non-union workers.¹⁷¹ In both cases, like *Akins*, coalitions of employees had standing to sue for information that shed light on third-parties who could be "corrupting" the relationship between employers and employees. In all similar union cases, the presupposition is that there is an existing, almost fiduciary, relationship that is "corrupted" or "injured" by a concrete violation. Just as candidates and parties must disclose conflicts of interests, such as the "role that AIPAC's financial assistance might play," employers must reveal conflicts of interest that might unearth employers' real motives that are potentially adverse to their employees,

164. "We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." *Id.* at 24-25.

165. *Id.* at 21.

166. 813 F. Supp. 1132 (E.D. Pa. 1993).

167. 394 F.3d 233 (4th Cir. 2005).

168. See, e.g., *Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. U.S. I.N.S.*, 336 F.3d 200 (2d Cir. 2003) (union suing the INS for information on raids to ascertain whether there is racial animus and employer retaliation against possible illegal aliens seeking to organize); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364 (Fed. Cir. 1999) (union seeking information on the rates provided for the Department of Commerce determination that Russia was not importing magnesium at less than fair market value and thus harming the U.S. market); *Am. Petroleum Inst. v. Occupational Safety & Health Admin.*, 581 F.2d 493 (5th Cir. 1978) (union intervening to support OSHA determination of threshold for benzene at the workplace in response to challenge by benzene producers).

169. 813 F. Supp. at 1140.

170. *Id.* at 1136.

171. 394 F.3d at 237.

their working environment, and generally, employee power within the corporate entity. The *Akins* injury was not so much an interference with the voters' informed choice when voting for candidates, but rather the lack of knowledge about how much AIPAC was influencing party decisions through funding, how that funding would affect the party's relationship with political workers, and the party's unwillingness to reveal public information with regard to those managerial decisions. Analogizing this to the labor context, action by a "voter union" can protect the voters' place in the party and act as a check against managerial abuses of discretion.

C. The Candidates as Political Managers

The view that candidates are political managers is not a new idea, but has been with us since the founding of the Republic.¹⁷² Political managers, like their private corporate counterparts, are not "Burkean elites," nor are they completely subservient to their constituents (voter-employees).¹⁷³ In fact both corporate and political managers follow a sensible middle-ground approach: business management scholars contend that corporate managers are neither "elites" who command their employees nor true "team" players who follow the wants of their employee-constituents. In fact, corporate managers are often a mix of both.¹⁷⁴ In essence, both political and corporate managers have a "command" and "representative" side to their jobs. The business-management framework is apt to describe legislative representation, especially in light of high incumbency rates; the relationships between politician-managers and voter-employees within the party-corporation are highly stable. Like corporate managers, political party managers are not completely beholden to their constituents, and, in fact, can "manage" their voters,¹⁷⁵ nor are voters beholden to their powerful candidate-managers.¹⁷⁶

Following the scholarship on corporate managers, the labor-centric model views political managers as similar to corporate managers. Both polar visions of political managers appear frequently in the literature and history of democracy.¹⁷⁷

172. Cf. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 365-66 (1992) (describing the views of George Washington and others arguing that candidates control and "command" votes).

173. For a short summary of the two polar views, see Kevin O'Leary, *The Citizen's Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1534 n.124 (2007).

174. See, e.g., Barry T. Hirsch & Edward J. Schumacher, *Private Sector Union Density and Wage Premium: Past, Present, and Future*, 22 J. LAB. RES. 487, 497 (2001). This view has been endorsed by many industry leaders, unions, and academics. See Allan D. Gilmour, *Union Management Cooperation*, 43 LABOR L.J. 513, 516 (1992).

175. See *supra* Part II.B.2.b (discussing gerrymandering powers).

176. See *supra* Part II.B.3 (discussing *Akins*-type litigation).

177. Samuel Issacharoff & Richard H. Pildes, *Election Law as Its Own Field of Study*, 32 LOY. L.A. L. REV. 1173, 1177-79 & n.18 (1990); see also David Schleicher, "Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections, 14 SUP. CT. ECON. REV. 163, 184-87 (2006).

The role of a candidate is therefore *not* simply to “channel the numerous opinions, interests, and abilities of the people of a State into the making of the State’s public policy,”¹⁷⁸ nor is it just to act as a “spokesman.”¹⁷⁹ On the one hand, candidates must represent to fellow managers within their political party the views of their “employee-constituents” (i.e., what their jurisdictions desire). On the other hand, representation is only one side of political management. The manager is also responsible for motivating, rewarding, controlling, and disciplining his or her voter-employees so that they accept the political compromises that the party wants to enforce upon the political manager’s constituents. As Macey suggests, politicians use the party’s corporate structure to serve their own interests; the party’s corporate structure helps candidates by allowing them to defer to the party on most policy positions and business decisions, which, in turn, frees them to focus on engaging and mobilizing their specific constituents (i.e., groups of voters and financial backers).¹⁸⁰ In a sense, this is similar to franchising, whereby candidates apply the national pre-packaged platforms and strategies to local conditions. This facilitates representation and management through standardization. The candidates can thereby more easily create and enforce a consensus among their allotted set of interest groups (i.e., “shareholders”) and geographical workers regarding the general party platform to which the candidates defer.¹⁸¹ Their disciplinary power over these members is powerful, since political managers, like corporate managers, can call on their positions as representatives of the corporate body to ostensibly enforce the corporate body’s will on their constituents. Richard Pildes and Elizabeth Anderson make two related observations that describe this “command” side of representation. First, they write, “[p]olitical institutions and decision procedures must create the conditions out of which, for the first time, a political community can forge for itself a collective will.”¹⁸² Second, they acknowledge that the party allocates decision-making power over procedural rules to the managerial class which can decide how to use these procedural devices to forge a collective will:

Like the managerial class well-known to the laws of corporate governance, these political managers readily identify their stewardship with the interests of the corporate body they lead. Like their corporate counterparts, they act in the name of the entity to protect themselves against outside challenges to their personal authority. Again, like their corporate

178. *Lucas v. Forty-Fourth Gen. Assembly of the State of Colo.*, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting).

179. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000).

180. Macey, *supra* note 28, at 1463.

181. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 280-81 (1994) (emphasis added).

182. Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2197-98 (1990).

counterparts, political managers use procedural devices, created in their incumbent capacity, to lock up their control.¹⁸³

Thus, Democratic and Republican managers use procedural devices to lock-up control over their constituents. This is best exemplified by gerrymandering. Managers can determine where to place their voter-workers according to "Taylorist" management techniques so as to maximize the production of their own power.¹⁸⁴ In essence, by using the corporate body's power, they can impose their will on their constituents. Justice Stevens has also noticed that the success of parties can be attributed to architect-managers of gerrymandering rather than the voter-employees.¹⁸⁵

Therefore, politicians have two constituencies akin to corporate managers: their voters (employees) and their political backers, i.e., party leaders (senior management) and financiers (shareholders). In his dissent in *Vieth*, Justice Stevens writes:

Elected officials in some sense serve two masters: the constituents who elected them and the political sponsors who support them. Their primary obligations are, of course, to the public in general, but it is neither realistic nor fair to expect them wholly to ignore the political consequences of their decisions.¹⁸⁶

The political manager is a party employee; political managers, like voters, must adhere to the party leadership's judgment or face discipline. For example, political leadership can expunge candidates or voters from its rolls if they are not "in sympathy with the principles of the party."¹⁸⁷ One other possible mechanism

183. Issacharoff & Pildes, *supra* note 4, at 647.

184. See, e.g., Hirsch, *supra* note 13.

185. *Vieth v. Jubelirer*, 541 U.S. 267, 329-30 (2004) (Stevens, J., dissenting) ("Gerrymanders subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles." (citations omitted)).

186. *Id.* at 332 (Stevens, J., dissenting).

187. "[I]n determining whether a voter was in sympathy with the purpose of a potential party, and whether the determination of a party leader was just," the lower court of New York noted:

"In so holding I do not mean that a voter may not change his party as he sees fit; that he may not enter a party for the sole purpose of seeking nomination and election; that he may not disagree with the party in its choice of candidates; that he may not criticize the party leadership and try to change it; or that he may not even oppose candidates of the party in an election. He may do any or all of these things and still remain a member of the party provided he is in reality in sympathy with its principles. But where, as I think it has been conclusively shown here, a man is not in reality in sympathy with the principles of a party he is not entitled to enroll in order to further his ulterior motives."

Rivera v. Espada, 777 N.E.2d 235, 238-39 (N.Y. 2002) (quoting *Matter of Mendelsohn v. Walpin*, 197 Misc. 993, 1000 (N.Y. Sup. Ct. 1950)); see also Persily, *supra* note 14, at 2220-21.

to control managers is the allocation of resources and national attention.¹⁸⁸ In a separate opinion, Justice Thomas notes that “coercion” through party allocation of campaign financing defines party politics. He writes:

As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. What could it mean for a party to “corrupt” its candidate or to exercise “coercive” influence over him? The very aim of a political party is to influence its candidate’s stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute “a subversion of the political process.” For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party’s platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system. To borrow a phrase from *Federal Election Comm’n v. NCPAC*: “The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [political groups] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.”¹⁸⁹

Politicians need and want to tap into parties’ distribution of interest group money to candidates and their party’s official endorsement. As Macey notes,

While this point is somewhat counterintuitive, because most people are taught that political parties are organized to serve the interests of voters, I would posit that, upon reflection, many would agree that political parties are designed to serve politicians’ interests at least as much as they are designed to serve voters’ interests. After all, politicians have far more at stake in choosing a party affiliation than do individual voters.¹⁹⁰

Political scientist John Aldrich has gone so far as to envision the party as a medium through which political managers assert their will and gain power.¹⁹¹ Particularly important for local candidates (i.e., lower-level political managers) is the party’s internal promotion mechanism; party leaders can choose who to

188. There is some, but mixed, evidence for the use of soft money to impose discipline in parties. See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 611-13 (2000).

189. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 646 (1996) (Thomas, J., concurring in part and dissenting in part).

190. Macey, *supra* note 28, at 1463.

191. See ALDRICH, *supra* note 13, at 19-20.

cultivate for national attention.¹⁹² The party's effective control over candidates, or budding political managers, starts when party leaders decide who can be promoted from mere party employee to political manager.¹⁹³ Politicians do not have any recourse against party leadership decisions; there is still little overt legal compulsion for internal accountability by party leadership to managerial groups within political parties. These decisions are subject to the leadership's managerial discretion. This discretion can be quite expansive, even including power over internal advertising by one group to other voter-employees and interest groups within the party.¹⁹⁴

Party management with regards to the "command" side of the job has changed over the years. The changing nature of corporate management parallels the changing nature of political party management.¹⁹⁵ Corporate boards have shifted managerial strategies dominated by hierarchical structures to more emphasis on team-orientated cooperative relationships between employees and management.¹⁹⁶ In similar respects, the era of "smoke-filled room[s]" that determined party nominations—and when major decision-making processes excluded employees from participation—have been replaced by quite open primaries and more, but still weakly, transparent mechanisms for party decisions.¹⁹⁷ Similarly in the corporate sphere, the most radical team-orientated corporate strategy gives the employees a "voice" within the corporation through stakeholder voting, thus permitting some employee input when considering who should run and win positions in management.¹⁹⁸ Primary elections analogously changed the way nominations for party leadership and representation in government are determined. A now-disfavored alternative method was to create managerial fiefdoms—party leaders would delegate and decentralize their management by giving lower-level managers political control and discretion over budgets, patronage, and promotions. These were the so-called "political machines," which some, as noted earlier, claim to have helped racial and ethnic minorities gain a piece of the political power because the party delegated racial

192. See, e.g., *Fed. Election Comm'n v. GOPAC, Inc.*, 917 F. Supp. 851, 856 (D.D.C. 1996) ("In 1990, GOPAC initiated 'Project 170,' which focused on 'recruiting, training and funding strong local and state candidates in specific congressional districts, with the expectation that successful candidates at the state and local level would run for higher office in the future.'").

193. See Persily, *supra* note 14, at 2218-21.

194. See, e.g., *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 92-93 (Tex. 1997).

195. A separate inquiry is how to organize the relationship between political managers and party leaders. While academics acknowledge the "managerial role" of party leaders and control over managers, there is a separate debate over the level and type of control party leaders should exert over relatively decentralized candidates. See, e.g., Rosenblum, *supra* note 52, at 827-31.

196. See *supra* note 174 and accompanying text.

197. See, e.g., *Nader v. Schaffer*, 417 F. Supp. 837, 843-45 (D. Conn. 1976) ("In the past, many political nominations were made by a process . . . described as the 'smoke-filled room.'").

198. See, e.g., Karmel, *supra* note 108, at 1171-72.

minority leaders management authority over members of their own race within the parties.¹⁹⁹

The candidate's primary managerial duty is to command by motivating and rewarding voter-employees within their member rolls. Fund-raising, stumping, making reward promises, personal contact, and other political campaign activities do not just enhance a candidate's image, but also motivate voters to vote and work despite labor-centric obstacles, such as fatigue. Political scientists identify an important voting phenomenon called "voter fatigue," also called "voter roll-off." Voter fatigue describes the fact that too many elections and too many candidates cause voters to ignore elections simply because voters are overworked. Some scholars compare voting to taking an SAT.²⁰⁰ Plaintiffs and courts have also acknowledged the "voter fatigue" phenomena, and one district court even framed voting as not necessarily a matter of interest, but rather one of "eagerness."²⁰¹ The political manager is responsible for invigorating his voter-employees. As Justice Stevens notes, "[s]peech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field."²⁰² Party contact is known to increase voter turnout.²⁰³ There is strong evidence that candidates tailor their messages so as to motivate voter-employees.²⁰⁴ For example, managers within former President George H.W. Bush's administration and the Republican Party had promised "'influence in the appointment process'" as a reward to the conservative-leaning Christian

199. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 108 (1990) (Scalia, J., dissenting) ("By supporting and ultimately dominating a particular party 'machine,' racial and ethnic minorities have—on the basis of their politics rather than their race or ethnicity—acquired the patronage awards the machine had power to confer."). The Supreme Court majority in *Georgia v. Ashcroft* emphasized the importance of allocating minority managers power. 539 U.S. 461, 483 (2003).

In addition to influence districts, one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. A legislator, no less than a voter, is "not immune from the obligation to pull, haul, and trade to find common political ground." Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5.

Id. (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

200. See Martin P. Wattenberg, Ian Mcallister & Anthony Salvanto, *How Voting Is Like Taking an SAT Test: An Analysis of American Voter Rolloff*, 28 AM. POL. Q. 234 (2000).

201. See *Vera v. Bush*, 933 F. Supp. 1341, 1348-49 (S.D. Tex. 1996).

202. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 398 (2000) (Stevens, J., concurring).

203. See, e.g., Priscilla L. Southwell, *The Effect of Political Alienation on Voter Turnout, 1964-2000*, 36 J. POL. & MATH. SOC. 131, 136 (2008).

204. *Fed. Election Comm'n v. GOPAC, Inc.*, 917 F. Supp. 851, 856 (D.D.C. 1996) ("In particular, GOPAC convened 'shirtless sessions,' which provided 'themes and message development for state and local Republican candidates,' and 'focus groups,' which identified and defined political issues that would motivate voters in various regions of the country.").

Coalition, who was “outsourced” the responsibility to mobilize and motivate voters within that interest group.²⁰⁵

D. The Campaign Contributors as Shareholders

I. The Analogy Explained

Analogizing campaign contributors to shareholders appears to be a natural fit, and this comparison has been debated extensively in the academic literature.²⁰⁶ This metaphor has, in part, spurred “campaign finance reform.” The Court generally does not view donations on a large scale as simply another form of organizational activity and voter participation as it did in *Tashjian*, but rather as a form of corruption.²⁰⁷ Indeed, the Court in *Buckley* wanted to distinguish the labor and the capital faces of campaign contribution. The Court separated the labor face of contribution, or “the symbolic *act* of contributing,” from the corrupting influence of the party’s dependence on capital: “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”²⁰⁸ The *Buckley* Court observed that candidates are dependent on large infusions of cash to support their campaigns:

The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy.²⁰⁹

This potential for a “quid pro quo” relationship harks back to the prior discussion regarding patronage.²¹⁰ Patronage and large financial contributions are

205. See Fed. Election Comm’n v. Christian Coal., 52 F. Supp. 2d 45, 69 (D.D.C. 1999).

206. See generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004). For a more critical view from a deliberativist and participatory viewpoint, see J. Skelly Wright, *Money and The Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Kroszner & Stratman, *supra* note 10 (extending analysis of firm strategy in the economic marketplace to PAC contributions in the political marketplace). There are real-life examples. The Democratic Party calls contributions “bonds” thus making contributors “bond-holders.” See Democratic Party, Take Control with “Democracy” Bonds, http://www.democrats.org/a/2005/06/democracy_bonds.php (last visited June 16, 2009) (on file with the *McGeorge Law Review*).

207. Compare *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 95 (2003) (“[T]he idea that large contributions to a national party can corrupt or create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible.”), with *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 (1996) (“Some of the Party’s members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party’s candidates.”).

208. See *Buckley v. Valeo*, 424 U.S. 1, 19-21, 26-28 (1976) (per curiam) (emphasis added).

209. *Id.*

210. Compare *McConnell*, 540 U.S. at 153 (“Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on the merits or the desires of their

the two most salient, problematic, but related, quid pro quo exchanges, i.e., rewarding political activity that helps the party with the use of government power.²¹¹ According to Richard Hasen, there is a competing and translatable relationship between political managers' use of patronage practices versus a reliance on campaign contributions.²¹² In the end, the judicial question is *which* and *at what level* can capital or labor investment into a candidate or party be legally rewarded and normatively justified as furthering democracy and as an acceptable form of political participation?²¹³ In both patronage and campaign contribution cases, the underlying problem is at what level do patronage or campaign contributions create a relationship that unduly influences office-holders when they balance party managerial responsibilities and public duties? In other words, at what level do patronage or campaign contributions create a long-term "conflict of interest?"²¹⁴ What the Court feared with the large amounts of contributions from a single source was the creation of a permanent relationship akin to the relationship between larger shareholders and corporate managers.

constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation. The evidence set forth above, which is but a sampling of the reams of disquieting evidence contained in the record, convincingly demonstrates that soft-money contributions to political parties carry with them just such temptation."), *with Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73 (1990) ("[Government employees] will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder." (describing *quid pro quo* in patronage context (i.e., promoting firing or hiring as a reward for performing in accordance with party wishes))).

211. See generally Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1311, 1311-14 (1993).

212. *Id.* at 1329 ("The substitutability of patronage and campaign contributions varies by region, the size of the political race, and the importance of the contested position.").

213. *Id.* at 1330 ("Choosing the optimal amount of patronage or campaign contributions in the presence of externalities requires balancing the benefits to the political system (the positive externalities) against the costs to the political system (the negative externalities). A political practice may have benefits such as protecting the First Amendment rights of political speech and strengthening the two-party system. It may have costs such as corruption and the squelching of First Amendment rights.").

214. Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted*, 18 HOFSTRA L. REV. 301, 334 (1989).

These criticisms are themselves unfounded once it is understood that the allegation need not be that the legislators are for sale, but that they routinely act within a position of conflict of interest. Perhaps it is likely that legislators would have acted in the same manner if the conflict of interest had not been present. That likelihood does not change the fact that, when they did act, the conflict existed. The studies of the public interest groups show the breadth of the conflict of interest problem; the investigative journalists' anecdotal evidence shows its quality.

Id.; see, e.g., *Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 688 (1996) (Scalia, J., dissenting) (describing the patronage practices in the contracting realm). In fact, the relationships are accounted for within the party. See, e.g., *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 531 U.S. 431, 459 (2001) (describing the "tallying" system); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("[V]oters tend to identify a big donation with a corrupt purpose.").

The relationship between campaign financier-shareholders and voters does not fit neatly into the consumer-centric framework. Under a consumer-centric framework, shareholders would finance corporate bodies and campaigns so that they succeed in gaining more market share and profit by attracting more consumers. Shareholders want companies to match and satisfy consumer interests to prevent their companies from losing to their competitors.²¹⁵ Under the consumer-centric framework, campaign financing should increase the welfare of all voter-consumers, as the corporation is better funded to serve the voter-consumer.²¹⁶

Yet, the judicial opinions above describe campaign financing and its relationship to voters differently. Shareholders buy permanent influence with corporate managers so that managers listen to *them*, not the voters. There is no general alignment of interests between shareholders and voters. Shareholders are not worried about attracting a larger popular vote with better candidates. Instead, they are worried more about what happens with party decisions *after* candidates win their offices.²¹⁷ The relationship between voters and campaign financiers is more akin to the relationship between shareholders and employees. Shareholders want corporate employees and voters to adhere to party discipline and, concomitantly, to yield to the shareholders' power over the corporate body. In essence, like the conflict between union (labor) and shareholder (capital) interests, campaign contributor-shareholders and voter-employees are also in a struggle for influence within the corporate body.

Progressive corporate law scholars seek other sources of power within the corporation to counteract the influence of controlling shareholders; other potential sources of power include minority shareholders, and possibly employees.²¹⁸ Thus, campaign financing does not focus on the number of campaign donors, but the *amount* of donations. The controlling shareholders (ones with the largest donations) have the power to distort the enterprise's

215. See, e.g., Frank E. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 8 (1984) ("Those who offer what consumers want—by design or by accident—and produce it at low cost will prosper. Rewards and punishments arise automatically in any market system. The investor who continually misunderstands the markets soon finds that he has no money left to invest; those who understand more soon control the bulk of liquid funds. The manager who lets costs get out of control or makes things no one wants finds that sales shrink. The influence of those who misunderstand or mismanage wanes.").

216. See, e.g., CHARLES R. BEITZ, *POLITICAL EQUALITY* 195-96, 202 (1989) ("The main public purpose of campaign activities is communicative. We do not take an interest in them only because, like voting, they are elements in a causal chain linking the preference of citizens with the formal mechanism for identifying winners and losers.").

217. See, e.g., John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 609-11 (2005) (describing the purpose and use of campaign financing); see also Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1202 (1994).

218. See, e.g., Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 155 (2003) ("Corporate law recognizes the inevitability of power imbalances. In response to the possible self-dealing of controlling shareholders and management, corporate law seeks to establish other resources of power in minority shareholders.").

direction.²¹⁹ Multiple donors of small amounts can equally balance the power (as exemplified by the image of the Obama 2008 fundraising campaign); in other words, multiple small donations can dilute shareholders' concentration of power or empower voter-laborers as a counter-weight. Nevertheless, as discussed further below, the diffusion of shareholder power into smaller donors fails to alleviate the problem that an increase in donations as a whole decreases the need for alternative political input or participation, such as labor-intensive political work.

Patronage and campaign contribution restrictions have not blunted the corporate form of parties—parties still need capital and labor. The viability of candidates is often determined by their “war chests” (just like corporate start-ups), more so than their credentials and support from voter-employees.²²⁰ Larger parties' competitive advantage is their ability to capture more capital and increase rewards to their employees. In the face of campaign finance reform and patronage restrictions, which do not reduce parties' essential need for capital and labor, political parties simply seek their capital and labor in less transparent ways, thereby driving capital and labor sourcing “underground.” Justice Thomas recently observed in a dissent that:

I could consider sources suggesting that parties in fact have lost power in recent years. I also could explore how political parties have coped with the restrictions on coordinated expenditures. As Justice Kennedy has explained, “[t]he Court has forced a substantial amount of political speech underground, as contributors and candidates devise ever more elaborate methods of avoiding contribution limits.” Perhaps political parties have survived, not because the regulation at issue imposes less than a substantial burden on speech, but simply because the parties have found “underground” alternatives for communication.²²¹

219. de Figueiredo & Garrett, *supra* note 217, at 628. To counteract this effect, de Figueiredo and Garrett argue, alternatively, that increasing the number of shareholders would diffuse and dilute the power imbalance. *Id.* They propose a tax credit that provides people with money to contribute to political campaigns; this would diffuse “shareholding” to a broader base and incentivize political parties to mobilize and seek out these new shareholders for capital. *Id.* at 648-50. A diffusion of shareholding will increase the labor-intensive nature of capital funding and thereby increase participation. *Id.* In essence, they suggest a way to align shareholder-financier and employee-voter interests by transforming employee-voters into shareholders. *Id.*; see also Brian L. Porto, *Less Is More and Small Is Beautiful: How Vermont's Campaign-Finance Law Can Rejuvenate Democracy*, 30 VT. L. REV. 1, 37-40 (2005).

220. de Figueiredo & Garrett, *supra* note 217, at 608-09. Compare D. Gordon Smith, *Team Production in Venture Capital Investing*, 24 J. CORP. L. 949, 970-72 (1999) (noting the support of venture capitalists in raising the reputation and viability of corporate start-ups), with Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 WASH. & LEE L. REV. 767, 811 n.206 (2003) (noting that large campaign “war chests” establish the viability and success of candidates), and Raskin & Bonifaz, *supra* note 217, at 1182-83.

221. Fed. Election Comm'n v. Colo. Republican Fed. Campaign, 533 U.S. 431, 473 n.4 (2001) (Thomas, J., dissenting) (internal citations omitted) (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 406 (2000)).

For example, there is much evidence that capital infusion into party politics has shifted to safe harbors under issue advocacy.²²² To take an analogy from the corporate sector, capital and labor sourcing has been "outsourced." PACs garner capital; interest groups, like the Christian Coalition, employ and manage voters.²²³ In his opinions, Justice Scalia has observed how patronage restrictions cause an outsourcing of voter employment to interest groups and how parties reward interest groups' labor by permitting them to voice their opinion on certain issues. He writes: "there is little doubt that our decisions in *Elrod* and *Branti*, by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade."²²⁴

In addition, much akin to economic work, American political work has become less "labor intensive." Courts have recognized the decline in the demand for labor by noting the relative decline in patronage practices and an increasing dependence on capital.²²⁵ This may, in part, be the result of the regulation of patronage practices and campaign financing, respectively. There is much more animosity toward patronage practices, as shown by the fact that patronage is substantially banned, while campaign financing is just controlled. Defenders of patronage practices will note that while capital contributions have been restricted by dollar amounts, patronage practices have been categorically barred for most positions. For example, Justice Powell prophesized the resulting shift from labor to capital:

Particularly in a time of growing reliance upon expensive television advertisements, a candidate who is neither independently wealthy nor capable of attracting substantial contributions must rely upon party workers to bring his message to the voters. In contests for less visible offices, a candidate may have no efficient method of appealing to the voters unless he enlists the efforts of persons who seek reward through the patronage system. Insofar as the Court's decision today limits the ability of candidates to present their views to the electorate, our democratic process surely is weakened.²²⁶

(Kennedy, J., dissenting)).

222. See, e.g., Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1759 (1999).

223. See *supra* text accompanying note 205.

224. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 107 (1990) (Scalia, J., dissenting).

225. *Landell v. Sorrell*, 382 F.3d 91, 172 (2d Cir. 2004) ("Incumbents in effect have capital—name recognition, an existing organization, tested donor lists, etc.—to draw upon without making expenditures . . . while virtually every significant capital-building activity by newcomers requires the use of resources that count toward the expenditure limits. Equally important is the fact that incumbents have methods of getting their name before the public that are not limited . . . while challengers do not.").

226. *Branti v. Finkel*, 445 U.S. 507, 528-29 (1980) (Powell, J., dissenting). Judge Becker of the Third Circuit provides extensive assessment of this phenomenon. See *Carver v. Foerster*, 102 F.3d 96, 105-10 (3d Cir. 1996).

Justice Scalia has also noted that:

Increased reliance on money-intensive campaign techniques tends to entrench those in power much more effectively than patronage—but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses—if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).²²⁷

As these Justices observe, the increasing dependence on capital substantially decreases the level of participation and labor required for the average voter. Now engagement and deliberation, which are perceived as necessary for “effective voting,” require merely following instructions from capital-fueled advertising. In the age of mass media, parties need fewer volunteers to get out the vote; television and capital-intensive advertising have replaced political machines.²²⁸ Daniel Ortiz calls the modern voter-laborer a “civic slacker [who] cedes his vote to the candidate with the better advertising campaign, just as the traditional vote seller cedes his vote to the vote buyer.”²²⁹ Perhaps the voter “ceding” his vote is not a voluntary choice, but rather a consequence of increased party capitalization. As capital-intensive campaigning increases and the campaign machineries become less labor intensive, the value and types of opportunities for labor-intensive political participation/employment decline.²³⁰ Congress has attempted to remedy the disproportionate effect of large contributions on voluntary labor by limiting capital flows while exempting labor contributions.²³¹ The consumption

227. See *Rutan*, 497 U.S. at 106 (Scalia, J., dissenting).

228. *Branti*, 445 U.S. at 528 n.9 (Powell, J., dissenting) (“Television and radio enable well-financed candidates to go directly into the homes of voters far more effectively than even the most well-organized ‘political machine.’”).

229. David R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 913 (1998).

230. See, e.g., *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 307-08 (1981) (White, J., dissenting) (“Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation in ballot measure campaigns and undermined public confidence in the referendum process.”).

231. See, e.g., *Frank v. City of Akron*, 290 F.3d 813, 816 (6th Cir. 2002).

“No candidate for Mayor or At Large Council shall accept or solicit, as a noncash monetary (i.e. checks, money orders, credit cards) or in-kind campaign contribution or loan, more than \$300 from any person, campaign committee, political party, or political action committee. No candidate for a Council Ward position shall accept or solicit, as a noncash monetary or in-kind contribution or loan, more than \$100 from any person, campaign committee, political party, or political action committee. No person, political action committee, political party, or political campaign shall contribute funds or in-kind contributions in excess of said amounts. Contributions from the candidate and labor of volunteers are exempt from these provisions.”

Id. (emphasis added) (quoting a City of Akron campaign finance reform amendment to the city charter). The implicit legislative intent is to equalize the contributory amounts’ power over candidates and the exempted voluntary labor. The same is true for federal laws. See 2 U.S.C. § 431(8)(A)(i)-(ii) (2000) (defining

model views the rise of capital and the value of labor as generally aligned—more capital for advertising equals more information and participation for the voter-consumer.²³² While it is true that more capital will increase mobilization and participation efforts,²³³ this relationship does not account for the trade-offs between capital-intensive political participation versus labor-intensive political participation.²³⁴ For example, opportunities for labor participation in political fundraising are *outsourced* to corporate companies, who subsequently outsource the business to cheaper call centers in India, to, presumably, conserve capital.²³⁵ Increased capital may increase broader participation but may lead to less meaningful participation.²³⁶ As philosopher Joseph Tussman concluded: "we may drift increasingly in the direction of ritualistic democracy . . . the vote will decide less and less as we move deeper into the morass of public relations, the projection of images, and the *painless engineering of consent*."²³⁷

2. The Labor-Capital Conflict and Voter Alienation

A theory relying on a "voter-as-consumer" trope is not concerned primarily with piercing the veil of corporate organizations, but with whether these organizations are healthily competing for the benefit of the consumer and the "equity shareholders."²³⁸ While a consumer-centric vision of the party accepts the

"contribution[s]"); *id.* § 431(8)(B)(i) (excluding "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee" from the definition of "contribution").

232. According to Richard Pildes:

Indeed, we might view deliberation in political markets as playing the same role that advertising and reputation play in economic markets for goods and services. Without a robust market in advertising, the markets for goods and services will be inefficient; consumers will not have the kind of information they need to make their purchasing decisions. . . . Yet that same insight applied to politics might suggest that deliberative theory—theories about how politicians give information to voters and how voters inform one another—is critical to well-functioning competitive politics.

Richard H. Pildes, *Competitive, Deliberative, and Rights-Oriented Democracy*, 3 ELECTION L.J. 685, 691-92 (2004).

233. Ansolabehere & Snyder, Jr., *supra* note 188, at 616-17.

234. See, e.g., PUTNAM, *supra* note 49, at 32, 39-40 ("Participation in politics is increasingly based on the checkbook, as money replaces time."); Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 381-82 (1995) (recognizing the trade-off and concluding that trading for more labor-intensive campaigning might in the end result in a more equal playing field); Rosenblum, *supra* note 52, at 837 ("For the most part, however, democratic theorists' interest in campaign finance reform is not about the relative strength and influence of parties vis-à-vis other political groups, but about voter influence—the worth of political rights.").

235. See Siddharth Srivastava, *How India Funds Bush's Campaign*, ASIA TIMES ONLINE, May 19, 2004, http://www.atimes.com/atimes/South_Asia/FE19Df04.html (on file with the *McGeorge Law Review*) (noting the outsourcing was done for "cost and efficiency gains").

236. See, e.g., SIDNEY VERBA, KAY L. SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 530-31 (1995); Rosenblum, *supra* note 52, at 843 ("Reintroducing the hoopla of elections is a matter of manpower not media.").

237. JOSEPH TUSSMAN, *OBLIGATION AND THE BODY POLITIC* 106 (1960) (emphasis added).

238. See Issacharoff & Pildes, *supra* note 4, at 648-49.

influence of shareholders on the corporate form, and is concerned with the market for corporate control,²³⁹ an adherent of the labor-centric model actively rebels against the influence of shareholders and the increased focus on capital-intensive methods. Labor tries to either diffuse shareholder control by creating employee-owned corporations or by forcing corporate decision-makers to consider their “first-order” fiduciary duties toward their workers in the face of growing dependence on capital.²⁴⁰ The focus of the inquiry returns to the voter or worker. As Raskin succinctly concludes: “[r]ight now the Supreme Court reasons backwards and upside-down from the imagined needs of the ‘two party system’ or ‘political stability,’ rather than forward and ground-up from the essential political rights of the citizen, the only standpoint from which a truly open and competitive democracy can grow.”²⁴¹

A resort to labor law or union experience analogies might be necessary to protect the value of labor. For example, the labor analogy can help explain the judiciary and public’s heightened concern over the fact that the presence of “equity stakeholders” may lead to “corruption” in parties.²⁴² Local elections provide some context for this concern. In some cities, nonresidents who have property are enfranchised simply by virtue of their capital investments within the jurisdiction, just like an equity shareholder.²⁴³ However, some disfavor this focus on property ownership as a determinant qualification for corporate decision-making because *residents* who participate and work in the community (the *labor*) should be the focus of franchise entitlement rather than outsiders who “buy” access to deliberative decisions without on-the-ground political engagement.²⁴⁴ In response, defenders of the practice do not justify enfranchisement based purely on property ownership; instead, they argue that property-ownership is itself a proxy for participation and membership in the community.²⁴⁵ Both sides of the debate agree, to some extent, that equity share-holding *by itself* (and not as a proxy for labor) does not justify political empowerment. In essence, “equity

239. *Id.*

240. Compare *id.* at 647 (describing the shift away from legal regulation and scholarship concerned with individual rights or “first-order duties of corporate managers by providing substantive content to fiduciary obligations that would then be legally enforced”), with Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL’Y REV. 375, 398 (2007) (discussing how labor law can answer skepticism that collective action and individual rights can coexist).

241. Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELECTION L.J. 559, 572 (2004).

242. See, e.g., *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 95 (2003) (“[T]he idea that large contributions to a national party can corrupt or create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible.”); VERBA, SCHLOZMAN & BRADY, *supra* note 236, at 530-31.

243. See *May v. Town of Mountain Village*, 132 F.3d 576, 582 (10th Cir. 1997). See generally Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553, 1562-66 (2002) (describing how campaign contributions and their link to political activity can be viewed as transfers of property).

244. See Ashira Pelman Ostrow, Note, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954, 1968-69 (2002).

245. See *id.*

shareholding" by itself "corrupts" the political arena because it equalizes those who actively engage and work (i.e., "labor") within the political community with those outside of the community who "buy" access into it.

The conflict in the party between capital and labor is real. There is some evidence that the perception of corruption, such as a party's heightened focus on capital rather than labor, would increase voter alienation and, thereby, lower voter turnout.²⁴⁶ To counteract voter alienation, participatory and deliberative democrats often use grassroots self-governing organizations at the local government level and the local unions as practical examples of how voters can be mobilized for power within a corporate structure.²⁴⁷ The use of unions and grassroots organizations as two exemplars of democracy in practice is not a coincidence. The alienated laborers in the economic corporate structure are like the alienated "grassroots" voters in the political structure.²⁴⁸ The analogy is useful. If one understands labor's need for unionization, then one would analogously understand the voters' need for grassroots democracy *and vice versa*.²⁴⁹ One study has shown that the strength of the labor movement is correlated with, and affects, aggregate voter turnout.²⁵⁰

An important justification for unionization is to promote "voice" in the community instead of exit. In their seminal work, labor economists Freeman and Medoff conclude that unions lead to more productivity, enhanced efficiency, more participation, and community-building (i.e., older workers are willing to help younger workers).²⁵¹ In a unionized workplace, workers are better able to voice their concerns and protect those most easily disempowered (i.e., the older workers).²⁵² Other labor economists justify the union's role to encourage voice using non-economic democratic norms.²⁵³ In this respect, democratic union-

246. See, e.g., John S. Shockey, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. MIAMI L. REV. 377, 391-400 (1985) (reviewing the evidence).

247. See, e.g., Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137 (2008) (describing a deliberative and participatory model for local government); Richard H. Fallon, Jr., *What Is Republicanism and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1697, 1734 (1989) (noting that the civic republicanism revival should focus on examining self-government through labor unions and local government).

248. The concern for *both* local government and trade unionism originated with one of the original "participatory democrats," G.D.H. Cole. See generally G.D.H. COLE, *LOCAL AND REGIONAL GOVERNMENT* (1947); G.D.H. COLE, *GUILD SOCIALISM* (1920).

249. See Peter Bachrach, *Interest, Participation, and Democratic Theory*, NOMOS XVI 47-49 (1975); see also BARBER, *supra* note 150, at 109-10 (identifying the link between *working* and *participation* in democracy through "common work" projects, whether laboring to renovate houses or to participate in local assemblies).

250. See Benjamin Radcliff & Patricia Davis, *Labor Organization and Electoral Participation in Industrial Democracies*, 44 AM. J. OF POL. SCI. 132, 140-41 (2000).

251. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 107-09 (1984).

252. See *id.*; PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 181-84 (1990).

253. See, e.g., ALBERT REES, *THE ECONOMICS OF TRADE UNIONS* 192 (1989).

analogues in the political context may be able to generate “voice” for alienated voters, thereby possibly enhancing the corporate party, such as increased community-building and protecting those most easily disempowered. Issacharoff notes that “a challenge to the malfunctioning of the political process requires the existence of alternative sources of power that are not immediately accountable to the political process.”²⁵⁴ One example Issacharoff presents is the presence of alternative systems, including an independent commission, to draw voting district lines in an effort to prevent the alienation of voters whose work has been diluted or devalued.²⁵⁵ In similar respects, a broader unionization of voters presents an alternative system (not accountable to the political parties) that counteracts the alienation of voters (caused by processes such as gerrymandering). They can also advocate for pork-barreling, voter legislation, and the disclosure and impact of campaign contributions. As Michael Kang has noted, independent non-partisan groups have a role in signaling approval for political initiatives that are fair to voters.²⁵⁶

Unionization focuses on circumventing the alienation of workers within the political structure, thereby improving the dynamic and long-term relationship between the voter and political parties. Mobilizing institutions that represent interests of the less powerful and less affluent have been shown to increase voter turnout *beyond* their institutional membership.²⁵⁷ For example, studies have shown that the presence and strength of a worker union can increase turnout of voters beyond its own membership.²⁵⁸ Not only does this provide some evidence for analogizing or linking worker and voter alienation, but a union of voters specifically representing voter interests can, perhaps, even more effectively counteract voter alienation on behalf of all voters beyond its institutional membership and outside of the workplace context.

In addition to a role for unions in counteracting voter alienation, this labor-centric perspective also identifies a role for the state analogous to its role in the labor market. One specific role is to support people who are forced out of the political marketplace unwillingly or who are unable to enter the political marketplace. In the political market, as in the labor market, there is no incentive for political parties to enlarge the labor market and provide more sophisticated work beyond the bare minimum needed to win.²⁵⁹

254. Samuel Issacharoff, *Oversight of Regulated Markets*, 24 HARV. J.L. & PUB. POL'Y 91, 97 (2000).

255. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1692-93 (1993). See generally Jeffrey C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997).

256. See Michael Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 707-08 (2006).

257. Neighley & Nagler, *supra* note 64, at 439-40.

258. *Id.*

259. Rosenblum, *supra* note 52, at 823 (“The goal of parties is not to ‘maximize the number of people who express an attitudinal preference for it,’ but to contest elections effectively.” (quoting John P. Frendreis et al., *The Electoral Relevance of Local Party Organizations*, 84 AM. POL. SCI. REV. 225, 227 (1990))).

As Nancy Rosenblum notes:

It is not so clear that money per se "squeezes out" participation Parties do. This failure lies with party officials comfortable with the status quo, interested in "winnability" above all, supportive of the least controversial candidates. It lies with party leaders, arrogant toward members and citizens overall, who treat their positions as personal fiefdoms. And with those suspicious of mobilization and resistant to opening up the association to substantive claims and deliberation.²⁶⁰

Treating the political market for voters like a labor market, the state, in cooperation with union-like institutions, can have some responsibility to train unemployed or underemployed workers so that they may obtain satisfying work when threatened with replacement caused by more capital-intensive production methods and shifts in corporate focus to other less costly locales.²⁶¹ In the political marketplace, the federal government is already somewhat involved (with its federal observer program) to counteract discrimination and other tactics that prevent minority groups from entering the political marketplace.²⁶² The federal observer program is a prime example of state involvement in removing barriers to entry; but beyond removing barriers, the state may also have a role, like in the labor market context, in training unemployed voters who overcome those initial market barriers but otherwise find no valued opportunities for political work. Such efforts may include training these voters for political action in other jurisdictions where their work is valued, or training them for participation in capital-intensive and new political work, such as internet blogging and campaigning.

Moreover, if the party is, as Macey and Aldrich, among others, have proposed, a conduit for political managers to assert power and command voters, legally protected unions have a role *within* parties to equalize voters' bargaining position vis-à-vis political management, particularly over important decisions in which they have no "voice," such as gerrymandering, financing, selecting the slate of candidates, primary scheduling, etc. One state-protected tool used in the bargaining process is the "strike," which is only differentiated from a similar phenomenon, shirking, because the union has signaled to management that the *decision* not to work is a form of dissent.²⁶³ Minority voters can also use their power over the decision to vote as a tool of dissent. In this sense, unionization of

260. *Id.* at 843.

261. One example in the economic marketplace is the Workforce Investment Act of 1998. *See generally* Nan Ellis, *Individual Training Accounts Under the Workforce Investment Act of 1998: Is Choice a Good Thing?*, 8 GEO. J. ON POVERTY L. & POL'Y 235 (2001).

262. *See generally* James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227 (2007) (describing the program and its successes).

263. *See generally* Heather Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1767 (2005) (noting that the teacher's union's decision to integrate was a form of dissent).

voters can signal dissent to party decisions by *not* voting. Refraining from voting, an affirmative act of dissent, would otherwise be misinterpreted as just malaise, alienation from the political system, disinterest in this specific election, or a “civic slacker” mentality. The state has a similar role in recognizing and protecting²⁶⁴ this legal instrument of protest as it has in the economic strike context. The following section uses the labor-centric model to try to better explain the decline in voter turnout by analogy to unemployment and its implications for public policy.

III. APPLYING THE LABOR-CENTRIC MODEL: UNEMPLOYMENT AND VOTER TURNOUT

Labor law and theories regarding labor in the economic marketplace may provide helpful analogies and insight for understanding the role of the voter in the political marketplace. There is something different about the market for labor when compared to traditional consumer markets. The choice of analogizing voters to consumers versus voters to laborers and the corresponding examination of the political marketplace as a consumer market versus a labor market has important consequences.²⁶⁵ The differences between the labor and consumer markets have direct implications for economic analysis of the “political market.” For example, the unique features of labor economics can be used to analyze one important problem in the political marketplace: the low turnout of voters. The “low turnout” problem can be analyzed using analogies to different categories of “unemployment” found in labor economics. By identifying these problems, the state can better hone its legal tools to alleviate these issues and increase voter turnout.

The initial analytical distinction is to differentiate between “choosing not to work” versus “an inability to find work,” or the distinction in labor economics between voluntary versus involuntary unemployment. The former is the trade-off between work/vote and leisure. Voluntary unemployment is an individual decision. This trade-off is influenced by the perceived rewards provided for voting, motivation from the party, and commitment to the party versus preferences for leisure. Amy Gutmann has written specifically on the intersections between election law and welfare law and the effects on this trade-off. She writes:

Given differential desires for political activity among individuals in a just society, the participatory activities of individuals are unlikely to be

264. For example, parties may gerrymander the jurisdictions with these voters or prevent these voters from participating in party events, such as the party convention.

265. There is something different about the market for labor when compared to traditional consumer markets. As economist Robert Solow observed, “[t]he labor market might just be different in important ways from the market for fish.” ROBERT M. SOLOW, *THE LABOR MARKET AS A SOCIAL INSTITUTION* 30 (1990).

radically equalized. But the liberal democratic ideal does not demand absolute equalization of participation among individuals or perhaps even among all groups. We can reasonably expect that participation rates among income categories would be equalized, as there is little evidence to suggest that small differences in income would produce large differences in preferences for political participation. *Present extreme differentials in income and in the availability of leisure time among classes help account for the great participatory gaps between classes, especially in those political activities (campaigning, for example) that demand a great deal of time and effort.* Not only income but enforced leisure differentials among groups would diminish significantly in a just society. Freely chosen differentials in use of leisure among individuals may then limit equality of participation, but those remaining inequalities would not be class based, but based more acceptably upon individual preference, influenced perhaps by group subcultures.²⁶⁶

For involuntary unemployment, the worker/voter already decides he wants to take the trade-off in favor of working/voting but *perceives* that, or in reality, he has no opportunity to work/vote. This unemployment is structural in nature—the market structure cannot employ him at that time. This initial distinction between voluntary unemployment and involuntary unemployment is important, because they require different legal (and non-legal) remedies. One is an arguably individual harm and a private decision; the other is a structural harm and a public decision.²⁶⁷ In labor economics, there is further categorization of involuntary unemployment into “frictional unemployment,” “structural unemployment,” “demand-deficient unemployment,” and “seasonal unemployment”²⁶⁸ to describe

266. AMY GUTMANN, *LIBERAL EQUALITY* 226 (1980) (emphasis added). Political science studies confirm that unemployment depresses voter turnout. See, e.g., Lisa A. Schur & Douglas L. Kruse, *What Determines Voter Turnout?: Lessons from Citizens with Disabilities*, 81 SOC. SCI. Q. 571, 585 (2000); Steven J. Rosenstone, *Economic Adversity and Voter Turnout*, 26 AM. J. OF POL. SCI. 25, 41-44 (1982) (“Economic adversity reduces voter turnout.”).

267. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1725-27 (2001)

As long as the state adheres to a territorially based system with contiguous districts and voting is racially polarized throughout the state, [a Latino voter] will always be outvoted by his white neighbors. That is true even if Latinos in other parts of the state can establish a dilution claim and obtain a remedial district. As long as the remedial Latino-majority district is contiguous, it will not reach our hypothetical voter. . . . Another possible response . . . is that the right derives from a structural principle regarding the way democracy should function. On that view, all Latinos—indeed, all voters—have an interest in a well-functioning democracy that makes room for the perspectives of racial minorities. The absence of concreteness stems from the fact that the right is a structural one rather than a classic individual harm.

Id. It is also arguable that persistent income differentials are results of structural harms such as segregation and discrimination.

268. See RONALD G. EHRENBURG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 566-89 (7th ed. 2000).

the different situations that may cause a real or perceived decline in employment opportunities.

The concept of “frictional unemployment” can be applied to the voting context; like labor unemployment figures, which include individuals between jobs, voter non-participation figures also include potential voters who are between jurisdictions. There are many different policies with regards to provisional ballots and out-of-state voters, and these policies may affect the level of frictional unemployment among the voters.²⁶⁹ The solution, as with frictional unemployment, is straightforward—to minimize the costs of moving. In the voting context, these costs often include registration and navigating jurisdictional rules.

The second type of unemployment is “structural.” Structural unemployment generally describes a mismatch between “the skills demanded and supplied in a given area or an imbalance between the supplies of and demands for workers across areas.”²⁷⁰ Some causes may include occupational or geographical imbalance; in other words, there is more supply than demand for a specific set of workers within an occupation or locale. Laborers are generally immobile because of their endowed geographical location or their (limited set of) skills, and therefore the labor market cannot easily adjust to the shifting geographic or occupational demands. Analogously, in the political marketplace, similar factors affect the mobility of voters. Structural unemployment is analogous to the situation of a voter who is not fully mobile with regards to voting choices and who perceives no meaningful opportunity for political work in his native jurisdiction.²⁷¹ In other words, certain voters do not vote or participate, because, in their jurisdiction, their political work is effectively valueless because they are consistently outvoted by an opposing majority.²⁷² Mobile voters, like mobile laborers, can simply move to another place where their voting and participation could make a difference: a place where they can “add” to the stability of the governing majority or tip the balance such that the parties are equal. They will

269. See, e.g., *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 578-79 (6th Cir. 2004).

In any event, there is no contradiction between requiring all voters in a county to be given a provisional ballot in case they are subsequently found to reside in the precinct in which they seek to vote, and then allowing the state to continue its practice of not counting votes cast outside of precinct. Although Congress certainly intended that some provisional ballots would be counted as valid after it was determined that voters should in fact have appeared on the list of qualified voters, there is no suggestion in either the legislative history of the statute or the statutory text that Congress intended all provisional ballots to be deemed valid.

Id.

270. See EHRENBERG & SMITH, *supra* note 268, at 574.

271. This assessment contrasts with the classical consumer-centric model of local voting patterns exemplified and influenced by Charles Tiebout, who assumed full mobility of the “consumer-voter.” See Tiebout, *supra* note 47, at 418-20 (explaining that an “additional” job seeker may only enter the employment market temporarily during a recession in response to changing financial circumstances of the family, while a “discouraged job seeker drops out of the market entirely”).

272. There is an argument that these groups who are consistently outvoted suffer a structural harm and should have standing to sue. See Gerken, *supra* note 267, at 1725-27.

then add their votes and political work to another jurisdiction's majority. The same situation affecting less mobile potential voters would have a different consequence. Those who cannot leave their jurisdiction for structural reasons will continue not to participate because their votes never matter; they will become permanently "discouraged" and, thus, drop out of the system.²⁷³ A similar theory underlies the difference between an "additional" job seeker and the "discouraged" job seeker in unemployment theory.²⁷⁴ For the more mobile workers/voters, their unemployment/non-participation is transitory and, in effect, can be considered frictional unemployment. However, even this categorization is complicated by gerrymandering. Gerrymandering may effectively prohibit relatively mobile voters from moving to another jurisdiction, since jurisdictional lines are in flux; they do not know if district lines will be permanent. This may create even more immobile voters. For the less mobile workers/voters, unemployment/non-participation is permanent and may require government encouragement and outreach so as to sustain their search for acceptable opportunities to participate within the marketplace.²⁷⁵

The solutions to structural unemployment of less mobile workers are complex, as the unemployment is often directly tied to geographical disparities in income that are exacerbated by gerrymandering. Many solutions try to attack these structural problems, and often these solutions have analogues in both unemployment and voting contexts.²⁷⁶ For example, Frug attacks the lack of mobility by combining the districts into multi-district regions so that less mobile voters can vote and participate, without moving, in other jurisdictions within the region; their votes will count in what they perceive to be more meaningful elections.²⁷⁷ This solution is similar to a telecommuting or a mass transit solution in the employment context, whereby the city provides infrastructure to allow less mobile job seekers to work in another area of the metro region, where there may be more jobs, without actually moving there.²⁷⁸ The solutions are mutually

273. See Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 308 (1991) ("An effective gerrymander may discourage minority-party voters from even going to the polls.").

274. Cf. EHRENBERG & SMITH, *supra* note 268, at 234-37.

275. One possible example is to inform and train voters for political activity that affects issues outside of the jurisdiction like fundraising for their political party or outreach to voters in districts that may make a difference. Another possibility is to educate voters on political gerrymandering and how they may mobilize to protest the re-drawing of district lines.

276. For example, tailored tax policies can help structural problems by creating incentives to leave for more suitable areas. See, e.g., Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1, 6, 16 (2005).

277. See GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 107-09 (1999).

278. David Luberoft, *Right on the Money*, GOVERNING MAGAZINE, Sept. 2000, <http://governing.com/archive/2000/sep/infra.txt> (on file with the *McGeorge Law Review*). A similar solution is presented in the union context whereby unions should bargain on a regional scale, thereby increasing the clout of geographically immobile workers in a localized community. See Irvin M. Freilich, Comment, *De Facto Coalition Bargaining*, 62 GEO. L.J. 325, 335 (1973).

reinforcing. Regionalization would diversify the voices that are taken into account in democratic decisions; the disadvantaged and immobile can (and have more incentive to) voice their opinions on a regional scale, allowing them to provide input on public transportation and infrastructure decisions that may enhance their labor and voting mobility. For example, mass transit facilitates political participation in non-local communities.

Similar to the mobility concerns, great disparities in endowed skills may also structurally inhibit or discourage voting. Education, not just information, is critical to improving the voter skills necessary to understand and work in an increasingly complicated political marketplace.²⁷⁹ Schools can get involved in the training of voters, not only in voting technology, but also in the benefits of and opportunities for general political participation.²⁸⁰ Justice Thomas has noted that “[a]lthough one of the purposes of public schools [is] to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity.”²⁸¹ Current political parties are focused on winning elections instead of fostering skills needed to empower new voters/consumers.²⁸² The emphasis on voting as labor demonstrates the concerns with human capital in an effort to remedy structural unemployment for political participation, whereas a consumption model does not.

A third type of unemployment is demand-deficient, or cyclical, unemployment, which tracks “fluctuations in business activity.”²⁸³ Unemployment rises because the national economy and businesses cannot maintain the level of employment due to declines in demand for their products. Cyclical unemployment can be analogized to a candidate’s or party’s loss of potential voters who drop out because their “candidate” lost in previous primaries or, based on electoral data and opinions, was expected to lose in the general election. Similar to the unemployment context, this may be because the candidate or party has not raised enough money or garnered enough confidence to run sustained campaigns in all electoral regions. Put another way, the inability of a business to gather fundraising and

279. See VERBA, SCHLOZMAN & BRADY, *supra* note 236, at 514. Studies confirm the relationship between education and voter turnout. See, e.g., Southwell, *supra* note 203, at 136; Brian Duff et al., *Good Excuses: Understanding Who Votes with an Improved Turnout Question*, 71 PUB. OPINION Q. 67, 87 (2007) (“What over-reporting the new turnout question does remove will allow researchers to highlight better and explore what is undoubtedly among the most significant findings regarding who votes and who does not vote in the U.S.—that those Americans who lack resources, and the confidence that they can understand politics and participate meaningfully, vote at astonishingly low rates. As a practical consequence of these findings, advocates of higher participation rates should allocate additional resources toward educating the citizenry about politics and the role of the citizen in a democratic society. . . . Efforts that fail to do so are unlikely to overcome the abysmal turnout rates found among those who have little concern for the outcome or little knowledge of politics.”).

280. VERBA, SCHLOZMAN & BRADY, *supra* note 236, at 3 (“The foundations for future political involvements are laid early in life in the family and in school.”).

281. *Zelman v. Simmons-Harris*, 536 U.S. 639, 681 (2002) (Thomas, J., concurring).

282. See *supra* text accompanying note 260.

283. EHRENBERG & SMITH, *supra* note 268, at 581.

broad-based support will lead the candidate to downsize efforts to "employ" more voters in more jurisdictions, thus leading to a drop off in potential support (because their party or manger is all but certain to lose that jurisdiction).

In effect, cyclical unemployment can be caused by "informational and reputational cascades" in both the economic labor and voting contexts.²⁸⁴ An informational cascade occurs when a person or institution follows previous judgments on the same problem, assuming that the judgment was rendered independently, *despite* information that may indicate a contrary conclusion.²⁸⁵ "[S]ubsequent participants will place more weight on the prior guesses than on their own [information], and eventually people will simply repeat what was said before."²⁸⁶ A related phenomenon—the reputational cascade—occurs when "people think that they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the good opinion of others."²⁸⁷ Such cascades are accentuated when a person held in high esteem gives the judgment.²⁸⁸

Cyclical unemployment in the labor market is often brought about because of information and reputational cascades. According to traditional Keynesian economics, a primary problem that underlies cyclical unemployment is the drop in investment demand caused by informational and reputational cascades about perceptions of the well-being in the economy.²⁸⁹ In other words, business people who notice that other business people have reacted in a certain way (e.g., layoffs) consistent with a forecast of economic downturn proceed in a similar fashion despite independent information that may suggest doing otherwise. In similar respects, candidates and political leaders, in response to media reports,²⁹⁰ levels of campaign donations, and previous primary results, may downsize mobilization efforts and signal decreased opportunities for political work in less productive

284. For a succinct explanation of informational and reputational cascades, see Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 160-64 (2006).

285. *Id.*

286. *Id.* at 161.

287. *Id.* at 162.

288. CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 66 (2003) (describing "fashion leaders"); see also *Brown v. Superior Court*, 487 P.2d 1224, 1231-32 (Cal. 1971).

Practices which were particularly found to have the effect of "misleading and deceiving the voter" where the use of "high sounding, patriotic names under which the real identity of the interested parties and actual proponents or opponents is disguised," the undercover employment as campaign workers of commercial, labor, social, and other leaders who occupied positions from which they might be able to influence large groups of persons who were unaware of the employment, and the commitment of some campaign workers to lend support both for and against particular propositions.

Brown, 487 P.2d at 1231-32.

289. See, e.g., ROGER W. GARRISON, TIME AND MONEY: THE MACROECONOMICS OF CAPITAL STRUCTURE 168-87 (2001) (describing and critiquing the Keynesian view).

290. See, e.g., Stephen M. Leonardo, Comment, *Restricting the Broadcast of Election-Day Projections: A Justifiable Protection of the Right to Vote*, 9 U. DAYTON L. REV. 297 (1984).

jurisdictions, essentially creating a voter perception that they are not needed in the election.²⁹¹

A fourth type of unemployment is “seasonal.” These unemployed workers are analogous to issue voters and those voters who may increase participation during a particular election. Like seasonal unemployment, such fluctuations in voting levels can be anticipated, as they follow a systematic pattern—a party can count and expect individuals of certain political persuasions to turn out for particular issues or rewards.²⁹² Distinct from cyclical voters, seasonal (single-issue) voters, like seasonal employees, come and go depending on the fads of a particular time or season—they are “energized” by particular issues or elections.²⁹³ These potential voters are usually disengaged from the system—either they are discouraged, or they never chose to participate (i.e., they refuse to give up their free time)—unless mobilization efforts are aimed at particular issues and particular rewards. One particular issue (e.g., a referendum issue) or one particular candidate may inspire them to vote in a one-time effort.

The unemployment analogy provides guidance in examining aspects of the low voter turnout problem. For example, just as with unemployment, we should be concerned not only by the “incidence of unemployment/non-voting,” but also by the “duration of spells of unemployment/non-voting.”²⁹⁴ It would be helpful to have longitudinal studies of non-voters and reasons for their failure to participate.²⁹⁵ Second, public policy and legal efforts addressing non-participation will have to identify the magnitude of each type of voter unemployment. From a labor-economics perspective, structural unemployment is one of the main justifications for government intervention and legal protection for unions; second-order regulation cannot necessarily guarantee first-order values, such as a specific adjustment of individual employees from one sector to another sector, or protection of the unemployed who are too old to return to the workforce.²⁹⁶ Similarly, it could be important for government to encourage participation by actively building communities and avenues for re-engaging political life, particularly for those who feel disenfranchised by structural changes in the system (i.e., vote dilution), by increased dominance by outsider special interests, and by entrenchment of jurisdictional lines so that they are consistently outvoted

291. Sociology professor Duncan Watts of Columbia University has suggested that such a cascade can explain Kerry’s rise and Dean’s fall in the 2004 election. See Duncan Watts, *The Kerry Cascade: How a ‘50s Psychology Experiment Can Explain the Democratic Primaries*, SLATE, Feb. 24, 2004, <http://www.slate.com/id/2095993/> (on file with the *McGeorge Law Review*).

292. See EHRENBERG & SMITH, *supra* note 268, at 588.

293. See Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLINE J. PUB. L. & POL’Y 255, 308 n.250 (2002).

294. See EHRENBERG & SMITH, *supra* note 268, at 565-66 (emphasis added).

295. See, e.g., Shockley, *supra* note 246, at 400-01 (suggesting that long-term and broader studies of more than one time period may better gauge voter alienation).

296. See EHRENBERG & SMITH, *supra* note 268, at 578 n.21 (providing sources discussing the possible role of government in reducing structural unemployment).

by a dominant majority. The threat of being “laid off” from their party is very real for immobile voters, as they are subject to redistricting efforts where the individual value of their votes and efforts are diminished by external forces.

Nonetheless, comparisons to intervention in the labor market are compatible with favoring second-order regulation that ensures the competitiveness of political markets.²⁹⁷ A competitive labor market is also highly desirable for voters in general. However, a labor-centric perspective, as described earlier, also justifies first-order legal interventions akin to current legal interventions into the labor-management relationship. Thus, in comparison to a consumer-centric view, the labor-centric view accommodates and identifies phenomena and problems in the political marketplace that may justify first-order and second-order legal intervention when such approaches may not be apparent or are ignored within a consumer-centric framework.

IV. MOVING FORWARD: THE USEFULNESS OF THE LABOR-CENTRIC MODEL

Beyond the low voter turnout problem, the labor market analogy can also shed light on some other interesting parallels between the labor and political markets. I will not exhaust examples here, but I will suggest two issues in election law where the labor market analogy may be useful.

A. *Bounding the Demos*

The gerrymandering problem reflects the “dilemma” of democracy: how to bound the *demos*.²⁹⁸ Under a voter-as-consumer paradigm, the market (political and economic) is theoretically boundless—voters and consumers who can access the political marketplace *should* be able to participate with price used as a discriminatory mechanism. Freer markets and increased access are ideal; the boundaries of the markets hinge on the limits of *access*.²⁹⁹ However, the political marketplace is not limited by access alone. An analogy to labor markets captures the debate over *demos* boundaries more accurately; the labor market and labor policy are concerned not only with access to the market, but also with shifting “qualifications” for entrance.³⁰⁰ The polity has determined that certain persons

297. For example, Mark N. Franklin et al. describe voters as having established stable relationships with political parties. See FRANKLIN ET AL., *supra* note 36, at 12. Franklin et al. also suggest, like Pildes, that electoral competitiveness is sufficient to increase voter turnout. See *id.* at 220-23, 220 n.13; Pildes, *supra* note 140, at 260.

298. ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 96-98 (1982) (describing gerrymandering as a dilemma of democracy).

299. See, e.g., Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1512 (2006) (noting the importance of free market theory to government policy regarding shareholders and corporate management in the 1920s and 1930s).

300. See *supra* Part III (regarding structural unemployment as one example where shifting demand in the marketplace causes workers who are no longer qualified for the jobs in supply to become unemployed and out of the marketplace).

with access and capability to participate in the political marketplace are nevertheless generally disqualified:³⁰¹ illegal immigrants, non-residents, minors, and felons. An analogy to labor markets encourages debate and parallels between our conceptions of “qualifications” in the labor and political marketplaces.³⁰²

B. Rethinking Choice in Elections

As this Article has discussed, an analogy to labor markets sometimes conceptualizes low voter turnout as “involuntary” and, thus, not a result of “free will.” In understanding structural unemployment, labor and political markets can be sensitive to influences of endowment, such as race, geography, and disability, on both employment and voting choice;³⁰³ these concerns also account for the often similar sociological and psychological pressures of being without choice for both the unemployed and disempowered (i.e., the “discouraged” worker/voter).³⁰⁴ Labor-centrism also accounts for the stability of voluntary preferences, like a “preference” for a party or loyalty to an employer. Stable preferences are the consequence of voluntary deliberation.³⁰⁵ Economic employment is similar to political membership it is a stable commitment and changes are often the consequence of voluntary deliberation. While people usually do not actively debate the merits of their consumption choices, they do defend their stable political and occupational affiliations.³⁰⁶

V. CONCLUSION

As David Cole notes, “[t]he weakness of the ‘marketplace’ story is its susceptibility to laissez-faire interpretation, which is in turn subject to a devastating practical critique.”³⁰⁷ Nevertheless, the marketplace metaphor is attractive and accepted as one tool in understanding democratic institutions. Pamela Karlan writes, “[w]e hold both market and nonmarket understandings of what politics is about simultaneously. We are both drawn toward and resistant to understanding politics as simply another form of market.”³⁰⁸ Daryl Levinson has

301. Historically, “voting was not seen as a right, but as a privilege to be provided to those thought best qualified to participate in governing the community.” Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1508 (2002).

302. See *supra* note 61.

303. See generally James B. Rebitzer, *Radical Political Economy and the Economics of Labor Markets*, 31 J. OF ECON. LITERATURE 1394 (1993).

304. Hanna Fenichel Pitkin, *Justice: On Relating the Private and Public*, 9 POL. THEORY 327, 342 (1981).

305. WERTHEIMER, *supra* note 55, at 294-306.

306. See, e.g., Rolf van Dick et al., *The Utility of a Broader Conceptualization of Organizational Identification: Which Aspects Really Matter?*, 77 J. OF OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 171, 172-73 (2004) (describing the complexity and effect of these affiliations).

307. Cole, *supra* note 2, at 239.

308. Karlan, *supra* note 57, at 1698.

also argued that analogies in general are unhelpful, because they imply a unitary theory of election law, but that markets can serve as one tool for designing democratic policy.³⁰⁹ The political marketplace analogy is attractive in part because it offers a straightforward theoretical "heroic consumer" framework³¹⁰ and, consequently, a susceptibility to laissez-faire interpretation.

Instead of adopting a practical critique, this Article offers an alternative "marketplace" story that accounts for the reluctance to fully commodify the political process, just as one naturally resists full commodification of labor.³¹¹ Thus, labor markets are not easily subjected to laissez-faire interpretation, particularly in light of the numerous regulatory regimes in place to protect laborers in the free market.³¹² An analogy between the private and public, by comparing labor and political marketplaces, serves a rhetorical and normative purpose it links similar experiences faced by the average citizen and attacks the dichotomization between the "public" and "private" spheres. In fact, recent events exemplify the intersections between the private and public spheres. For example, Wal-Mart allegedly used its economic corporate pressures to urge its employees not to work for President Obama during his presidential campaign.³¹³

A vision of a truly democratic society includes a vision of workplace democracy.³¹⁴ Through a labor-centric view of the political marketplace, the political marketplace and the workplace have much to learn from each other. Comparing how democracy is implemented in workplace laboratories may be useful for understanding democratic governance generally. And, as many labor law academics have noted, the conceptions of democratic governance can also revitalize labor law.³¹⁵

309. Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745, 1758-59 (1999).

310. Kysar, *supra* note 7, at 632-35.

311. Karlan, *supra* note 57, at 1698-99.

312. See, e.g., Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 32-34 (1988).

313. Ann Zimmerman & Kris Maher, *Wal-Mart Warns of Democratic Win*, WALL ST. J., Aug. 1, 2008, at A1.

314. Issacharoff & Pildes, *supra* note 177, at 1183 ("Moreover, expanding the focus from elections to democratic self-governance enables us to begin forging connections between election law and the next frontiers of self-government. These connections implicate private corporate governance, union democracy, workplace participation, and the uncertain status of other intermediate institutions through which citizen involvement in all forms of politics can be made meaningful and effective.").

315. Klare, *supra* note 312, at 68 ("The reform agenda is founded on the central premise that labor law should promote and enhance democracy at every level of working life: within firms, in collective bargaining, in unorganized labor markets, and in the institutional relationships between paid employment and the other aspects of social life.").